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No. (1)

IN THE
SUPREME COURT OF THE UNITED STATES

CAPITAL CASE

WILLIAM VAN POYCK,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

— CAPITAL CASE —

In Florida, a defendant is entitled to relief on the grounds of newly discovered evidence if such evidence "probably" would have changed the outcome. *Jones v. State*, 591 So.2d 911 (Fla. 1991). Here, in sentencing Van Poyck to death his original capital sentencers found that Van Poyck shot and killed a prison guard in an attempt to free an inmate from a prison van, based presumably on the prosecutor's arguments to that effect. Newly discovered evidence establishes that Petitioner was not the triggerman. The Decision below nonetheless precludes Van Poyck from having a new sentencing jury weigh, consider and give meaningful effect to this newly discovered mitigating evidence on the grounds that it would have made no difference to his sentence. The questions presented are:

1. Where a defendant is sentenced to death by a judge and jury who made findings that he was the triggerman, is it a violation of the Eighth and Fourteenth Amendments to deny that defendant the right to present newly discovered evidence disproving the triggerman theory solely on the grounds that, as a matter of law, such evidence "probably" would not have affected the sentence?

2. Must reviewing courts in "weighing" states apply *Chapman v. California*'s harmless error analysis, or *Boyde v. California*'s "reasonable likelihood" standard to death sentences rendered inherently unreliable by findings that affect the sentence and are later shown to be affirmatively false?

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PETITION FOR WRIT OF CERTIORARI

Petitioner William Van Poyck, a state prisoner under sentence of death for a conviction of felony murder, respectfully petitions this Honorable Court to issue a writ of *certiorari* to review the decision of the Supreme Court of Florida, rendered on May 3, 2007, affirming the denial of Van Poyck's post conviction challenge to his death sentence, with rehearing denied on July 16, 2007.

OPINION BELOW

The Supreme Court of Florida's May 3, 2007, 6-1 decision below (Pet. App. A-1-22) is reported at 961 So.2d 220 (Fla. 2007). The July 16, 2007, order of the Supreme Court of Florida denying rehearing appears at Pet. App. B-1-2.

JURISDICTION

The majority's decision below (hereinafter Decision) was rendered on May 3, 2007. A timely motion for rehearing was denied on July 16, 2007. Jurisdiction to review the Decision below by writ of certiorari is conferred on this Court by Title 28 U.S.C. §1257(a), and Rule 10(c), Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition raises issues under the Eighth and Fourteenth Amendments of the United States Constitution, as set forth in Petitioner's Appendix at I-1.

STATEMENT OF THE CASE

A. Preliminary Statement

This Petition is submitted on behalf of a prisoner sentenced to death by a jury and judge who mistakenly believed that he was the triggerman in a premeditated murder. The State now openly concedes that Van Poyck was not the shooter, as did the Florida Supreme Court in Petitioner's direct appeal. Petitioner nonetheless stands precluded from having a jury weigh, consider and give effect to the impact of Petitioner's status as a mere accomplice, as well as what three Justices of the Florida Supreme Court, in a previous opinion, termed a "vast array" of compelling mitigating evidence that was not introduced at trial. Instead, in its most recent decision in this case, the Florida court placed itself in the stead of the jury and declared that whether Van Poyck was the killer or not "probably would not have resulted in a different sentence."

B. Underlying Facts

Petitioner William Van Poyck was convicted of first-degree murder and sentenced to death following a botched attempt by Van Poyck and an accomplice, Frank Valdes ("Valdes") to free James O'Brien ("O'Brien"), from a prison transport van in West Palm Beach, Florida. The Supreme Court of Florida summarized the evidence at trial in deciding Van Poyck's direct appeal. *Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990) (*Van Poyck I*) (Pet. App. C-1-11). Briefly, on June 24, 1987, corrections officers Fred Griffis and Steven Turner transported O'Brien from

Glades Correctional Institution to a doctor's office in West Palm Beach. After the officers parked the prison transport van, they were confronted by Van Poyck and Valdes, both armed with pistols. Van Poyck forced Turner from the van, took Turner's gun, and forced Turner beneath the passenger's side of the van. While Turner was squeezing under the van, he saw Valdes' feet as Valdes forced Griffis from the driver's side of the vehicle to the rear of the van. Almost immediately, while Turner watched two sets of feet — Valdes' and Griffis' — at the rear of the van, "he heard a series of shots and saw Griffis fall to the ground." *Id.* at 1067.

Van Poyck was tried first. Prior to trial it became evident that the central disputed factual issue, relevant to both phases of the trial, was the identity of the triggerman. Van Poyck testified at both the guilt phase and penalty phase, denying that he was the shooter or that he had even witnessed the shooting. Van Poyck's counsel argued that the evidence proved Valdes shot Griffis, while the State argued that circumstantial evidence showed that Van Poyck fired the fatal shots. The prosecutor vigorously argued at both the guilt and sentencing phases that Van Poyck was the shooter. In fact, the prosecutor emphasized the importance of the triggerman issue to the sentencing decision, arguing to the jury that it "was irrelevant to the guilt phase and has more bearing as to the penalty." RA. 2913; 2932-46.

The case went to the jury under dual theories of first-degree murder: premeditated or felony murder. The trial court submitted to the jury an unorthodox "special verdict form" (Pet. App. at G-1-

11). The jury was first instructed to unanimously determine if Van Poyck was guilty of "first-degree murder." It was then asked to more specifically determine if Van Poyck was guilty of "premeditated murder," "felony murder," and/or "both." Jurors were to check "premeditated murder" if *any* juror found Van Poyck guilty of only "premeditated murder", to check "felony murder" if *any* juror found Van Poyck guilty of only that offense, and to check "both" if *any* juror found Van Poyck guilty of both felony and premeditated murder. RA. 3046-47.

The jury returned a unanimous general guilty verdict on first-degree murder. With respect to the subcategories described above, the jury checked the box for "felony murder", and the box for "both." RA. 4138; Pet. App. at G-1. This meant that anywhere from 1 to 11 jurors believed Van Poyck was guilty of premeditated murder and was, under the facts of this case, the triggerman.[1]

During the penalty phase the State continued to argue that Van Poyck was the triggerman. RA. 3511-12; 3522; 3524-25. The jury recommended a sentence of death by a vote of 11 to 1. The trial court, required by law to give "great weight" to the jury recommendation, *Grossman v. State*, 525 So.2d 833, 839 n.1 (Fla. 1988), sentenced Van Poyck to death. The trial judge found four statutory aggravating circumstances and no mitigation. The judge's sentencing order made specific reference to

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[1] At Valdes' subsequent trial he was also convicted and sentenced to death. In 1999, nine Florida State Prison guards beat Valdes to death in his cell. John Pacenti, *Inmate Beaten To Death, Says Ex-Guard*, Palm Beach (FL) Post, January 25, 2002 at 1A, *available on* WESTLAW, 2002 WLNR 1965015.

his belief that Petitioner was the triggerman: "The Court further finds that the State . . . *presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.*" Pet. App. at F-4 (emphasis added). Thus, from 1 to 11 members of the jury, and the trial judge, expressed the belief that Van Poyck was guilty of premeditated murder, and was or may have been the triggerman — and certainly were not able to consider and give meaningful effect to irrefutable, mitigating proof that Van Poyck was, in fact, not the shooter.

C. The Direct Appeal Decision

On direct appeal the Supreme Court of Florida specifically acquitted Van Poyck of premeditated murder, and acquitted him of being the triggerman, based upon insufficiency of the evidence to support either theory. *Van Poyck I*, 564 So.2d at 1069, 1070; Pet. App. at C-6-8. However, the Court found sufficient evidence to sustain a conviction for felony murder, and upheld the death sentence with a cursory analysis under *Tison v. Arizona*, 481 U.S. 137 (1987). Though none had been made by the trial court or jury (since they were operating under the belief that Van Poyck was the triggerman), the Court purported to make its own *Tison* factual findings:

> Although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdez [sic] arrived at the scene "armed to the teeth." Since there is no question that

> Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional.

Id. at 1070-71. This Court denied *certiorari* review. *Van Poyck v. Florida*, 499 U.S. 932 (1991).

D. The 1997 Post Conviction Appellate Decision

Van Poyck thereafter initiated post conviction proceedings pursuant to Florida Rule of Criminal Procedure 3.850, raising, among other claims, ineffective assistance of counsel at the penalty phase. An evidentiary hearing uncovered extensive, substantial mitigating evidence which had never been presented to Van Poyck's jury or judge. After the trial court denied all claims, a sharply divided Supreme Court of Florida affirmed, rendering a 4-3 split decision. *Van Poyck v State*, 694 So.2d 686 (Fla. 1997) (*Van Poyck II*). Three Justices dissented from the denial of relief on the ineffective assistance of penalty phase counsel claim, and noted that there was "a vast array of mitigating circumstances. . . that should have been thoroughly investigated and presented at the original penalty phase." *Van Poyck II*, 694 So.2d at 699-700 (Anstead, J., dissenting); Pet. App. at E-38-39.

E. The DNA Decision

In 2003, Van Poyck filed a Motion for Post conviction DNA Testing in the trial court pursuant to then newly-enacted Florida Stat. §925.11, and Florida Rule of Criminal Procedure 3.853, which

affords all prisoners a right to obtain post conviction DNA testing if they meet the pleading requirements. To obtain relief the prisoner must demonstrate that "...there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial." Fla.R.Crim.Proc. 3.853 (c)(5)(C).

Van Poyck's motion asserted that DNA testing would reveal the presence of the victim's blood on Valdes' clothes and the absence of the victim's blood on Van Poyck's clothes. Based upon the particular facts of this case this evidence could conclusively prove that Valdes was the triggerman. This, Van Poyck argued, would establish compelling mitigating evidence which his jury had never been able to consider, weigh and give effect to, contrary to the Eighth Amendment principle underlying *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). This DNA evidence, combined with the "vast array" of mitigating evidence uncovered during earlier post conviction proceedings and never heard by the original jury, would, Van Poyck asserted, create "a reasonable probability that Van Poyck would have received a lesser sentence" had his jury been aware of its existence.

On May 19, 2005, the Supreme Court of Florida affirmed the denial of relief in a 6-1 decision. *Van Poyck v. State*, 908 So.2d 326 (Fla. 2005) (*Van Poyck IV*); Pet. App. at D-1-15. Without addressing Van Poyck's argument that he had an Eighth Amendment right to have his sentencers consider and give effect to the substantial mitigating evidence that he was not the triggerman, and without

weighing, considering or even mentioning the "vast array" of additional mitigating evidence uncovered during prior post conviction proceedings, the majority concluded that there could be "no reasonable probability that Van Poyck would have received a lesser sentence had DNA evidence establishing that he was not the triggerman been presented at trial." *Id.* at 330; Pet. App. at D-11.

Justice Anstead dissented, noting the "common sense" reality that "there is a vast difference in the importance of the defendant being the triggerman in a shooting death" for purposes of guilt than there is at the penalty phase. *Van Poyck IV*, 908 So.2d at 331 (Anstead, J., dissenting); Pet. App. at D-12. Justice Anstead emphasized the crucial role the triggerman theory played in both Van Poyck's conviction and sentence, quoting from the trial record to show the prosecutor had urged the jury to find Van Poyck was the shooter. Thus, Justice Anstead noted, "We need only examine the trial record in this case to see explicit proof that the identity of the triggerman was both important and at issue in the jury's assessment of the appropriate penalty for Van Poyck." *Id.*, Pet. App. at D-13. *Id.* at 332; Pet. App. at D-14. This Court denied *certiorari* review. *Van Poyck v. Florida*, 126 S.Ct. 1570 (2006).

F. The Decision Below

In 2005, while his appeal of the denial of his motion for DNA testing was pending in the Supreme Court of Florida, Van Poyck filed a successive motion for postconviction relief predicated upon "newly discovered mitigating evidence" in the form of a sworn affidavit asserting that Valdes had confessed

to the affiant (and to others) that he, Valdes, had killed Fred Griffis. The constitutional basis of this motion mirrored that of the previously filed (and then pending on appeal) motion for DNA testing: that because Van Poyck's jury had sentenced him to death under the mistaken belief that he was the triggerman, the death sentence was inherently unreliable. On June 23, 2005, some five weeks after the Supreme Court of Florida handed down its decision affirming the denial of DNA testing (*Van Poyck IV*), the trial court denied the motion.

Van Poyck appealed to the Supreme Court of Florida, again pressing his constitutional claim that his death sentence was fatally tainted where his original jury was unable to consider and give effect to the newly discovered constitutionally relevant mitigating evidence that he was not the triggerman and was not guilty of premeditated murder. In his initial appellate brief Van Poyck conceded that the Court's just-released opinion in *Van Poyck IV* was controlling, but urged the Court to reconsider that decision in light of this Court's intervening decision in *Bradshaw v. Stumpf*, *supra*, which appeared to conflict with the reasoning underlying *Van Poyck IV*. Van Poyck also noted that "Florida juries rarely recommend a death sentence for a defendant who was not himself the triggerman," and showed that out of those 372 prisoners on death row Van Poyck stood alone as the one person convicted of felony murder who did not kill, participate in the killing, or solicit someone to kill the victim. This analysis was proffered to show that it *was* probable that it would have made a difference to Van Poyck's jury had they *known* Van Poyck was not the killer.

On May 3, 2007, the Supreme Court of Florida rendered the Decision below, denying relief. *Van Poyck v. State*, 961 So. 2d 220 (2007) Pet. App. at A-1. In so doing, the Court assumed that all prerequisites for seeking relief on the grounds of newly discovered evidence had been met. Nonetheless, the Court denied relief on the grounds that evidence establishing that Van Poyck was not the triggerman "probably" would not create a different result.

In his timely motion for rehearing Van Poyck argued that the majority had misread and misapplied *Bradshaw* by failing to recognize the fundamental similarities between *Bradshaw* and Van Poyck's case. Van Poyck also argued that the majority had failed to properly analyze his claim under the Eighth Amendment, as set forth in *Lockett v. Ohio*, *Hitchcock v. Dugger*, 481 U.S. 393 (1987), *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Johnson v. Texas*, 509 U.S. 350 (1993), which collectively hold that a defendant has an Eighth Amendment right to have his capital jury consider and give effect to constitutionally relevant mitigating evidence in imposing sentence. Pet. App. at H-1-5. By order dated July 16, 2007, the majority denied Van Poyck's motion for re-hearing. Pet. App. at B-1.

REASONS FOR GRANTING THE WRIT

For the past three decades this Court's capital sentencing jurisprudence has been dominated by two closely related lines of decisions. On the one hand is the body of law stretching from *Lockett v. Ohio*, *Eddings v. Oklahoma*, and *Parker v. Dugger*, 498

U.S. 308 (1991), through *Penry v. Johnson*, *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007). These cases collectively establish a capital defendant's Eighth Amendment right to have his sentencers weigh, consider and give meaningful effect to constitutionally relevant mitigating evidence. This principle is mandated by the constitutional imperative that "the sentence imposed at the penalty stage should reflect a reasoned, *moral* response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302 (1989), at 319. (emphasis in original). "Only then can we be sure that the sentencer has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence." *Id*, at 319 (quoting *Woodson v. North Carolina*, 428 U.S. 280 (1976), at 304).

On the other hand are those decisions regarding death sentences called into question because they rested, wholly or in part, upon subsequently invalidated aggravating circumstances. *See, e.g., Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Stringer v. Black*, 503 U.S. 222 (1992); *Sochor v. Florida*, 504 U.S. 527 (1992); *Richmond v. Lewis*, 506 U.S. 40 (1992). A capital sentencer's consideration of such an invalid aggravating circumstance necessarily "infects" the death sentence, *Richmond v. Lewis*, 506 U.S. at 49, and, in "weighing states" it "skews the weighing process itself" toward death, *Stringer v. Black*, 503 U.S. at 232, rendering the ultimate death sentence invalid under the Eighth Amendment's requirement for "individualized

sentencing determinations in death penalty cases." *Id.*

These two lines of cases represent reverse sides of the same constitutional coin for both are grounded on the same constitutional bedrock and share the identical concern: *whether the death sentence is reliable.* Both lines of cases involve a sentencing calculus called into question because it either *omitted* relevant mitigating evidence, or *included* a subsequently invalidated aggravating factor. Both lines of cases also share the same legal standard for reviewing courts to apply in correcting this type of constitutional sentencing error regarding the balance of aggravating and mitigating factors: either *Chapman v. California's* harmless error analysis, or the functionally equivalent "reasonable likelihood" standard enunciated in *Boyde v. California*, 494 U.S. 370 (1990), at 380. This Court has never countenanced a reviewing court's application of a more heightened standard of review to this type of constitutional error.

This case occupies the intersection of these two well-established lines of cases where it is uncontroverted that Van Poyck was sentenced to die by sentencers relying upon the erroneous "fact" that he was a triggerman guilty of premeditated murder (findings subsequently invalidated, and which are the functional equivalent of an "aggravating circumstance" under *Brown v. Sanders*, 546 U.S. 212 2006)), and who were simultaneously unable to weigh, consider and give meaningful effect to the belatedly established (as well as the newly discovered) mitigating evidence that Van Poyck was neither the triggerman nor guilty of premeditated

murder. The dispositive issue presented here is whether this death sentence, or any death sentence rendered under similar circumstances, is inherently unreliable and fundamentally unfair.

Moreover, the Decision below has upheld this highly suspect death sentence by requiring Petitioner to meet the heightened *Jones* standard, one more stringent than that mandated by this Court's relevant capital precedents. The Petition thus presents the opportunity to reconcile the standard for correcting constitutional error generally with that employed by Florida in newly discovered evidence cases.

Put another way, this case provides an opportunity for this Court to clarify for lower courts that *Chapman's* harmless error analysis, or *Boyde's* "reasonable likelihood" standard are the *only* constitutionally permissible standards for reviewing death sentences which have been undermined by the sentencers having been precluded from weighing, considering and giving meaningful effect to constitutionally relevant mitigating evidence.

And, armed with this standard, this case presents this Court with the opportunity to answer the constitutional question specifically left unanswered in *Bradshaw v. Stumpf*: to what extent, and under what circumstances is a death sentence constitutionally undermined where it was predicated upon the sentencer's mistaken (and subsequently invalidated) belief that the defendant was the triggerman?

ARGUMENT

I. IN LIGHT OF THE FINDINGS OF THE JURY AND TRIAL COURT THAT VAN POYCK WAS THE TRIGGERMAN, THE FAILURE TO ALLOW VAN POYCK TO CHALLENGE SUCH FINDINGS WITH NEWLY DISCOVERED EVIDENCE ON THE GROUNDS THAT IT IS IRRELEVANT TO HIS DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Florida Supreme Court's denial of relief creates a troubling rule in death penalty jurisprudence: that the status of a defendant as the triggerman has no bearing on the death sentence. In that regard, it should be pointed out that, while this is a newly discovered evidence case, it is *not* a case where Van Poyck failed to follow Florida law in connection with the timing or procedural requirements for newly discovered evidence. *Herrera v. Collins*, 506 U.S. 390, 407 (1992) (noting that "there is no doubt "petitioner was seeking "additional process" beyond that afforded under state law). Nor is it a case where the evidence itself would have little chance of changing the underlying factual predicate for the sentence. *Herrera*, 506 U.S. at 421 (O'Connor, J. concurring) (noting that the record "overwhelmingly" rebutted the Petitioner's actual innocence claim).

Rather, this is a case where we know that a trial judge and jury found Van Poyck to be the

triggerman. We now have evidence showing that he is not. And the Florida Supreme Court has said *that does not matter*.

Among other problems, such a position is in direct conflict with *Bradshaw v. Stumpf*, where this Court decided, *inter alia*, that a defendant's guilty plea need not be voided simply because a prosecutor used inconsistent theories by alleging, at separate trials, that each of two co-defendants was the sole triggerman. *Bradshaw*, 545 U.S. at 186-87. Nevertheless, this Court commented that "it is at least arguable that the sentencing panel's conclusion about Stumpf's principal role in the offense was material to its sentencing determination." *Id.* at 187. Consequently, this Court remanded for findings as to whether a later inconsistent position taken by the prosecutor amounted to a due process violation.

This case is factually similar to, but procedurally different from, *Bradshaw*, and it is the procedural difference that provides the opportunity for this Court to answer the question left open in *Bradshaw*. Specifically, in *Bradshaw*, just as in Van Poyck's case, the State first argued for and obtained a death sentence for the defendant based upon the theory that he was the actual killer. In both cases the State also argued an alternative theory to justify a death sentence. In both cases the defendant was precluded from having his sentencers consider and weigh the mitigating *fact* (not just argument) that he was not the killer. In both cases the record establishes that the actual sentencers *believed* each defendant was the triggerman. And, subsequent to the imposition of each death sentence it came to light

that the defendant was not the triggerman, but that the codefendant was.

Both Stumpf and Van Poyck received death sentences rendered in the absence of the mitigating fact that each was not the triggerman. Resolution of the open constitutional question does not turn on *how* it was subsequently "revealed" that the defendant was not the killer. Rather, the central open question after *Bradshaw* is this: whether a death sentence obtained under the state's theory that the defendant was the triggerman is rendered unconstitutional by the State and Florida Supreme Court's subsequent admission that he was not the triggerman.

As Justice Souter observed in concurrence:

> I understand Stumpf to claim that it violates the basic due process standard, *barring fundamentally unfair procedure*, to allow his death sentence to stand. . . .As I see it Stumpf's argument is simply that a death sentence may not be allowed to stand *when it was imposed in response to* a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant.

Bradshaw, 545 U.S. at 186 (Souter, J., concurring) (emphasis added). After referencing "the heightened need for reliability in capital cases," *Id.*, Justice Souter concluded:

> Ultimately, Stumpf's argument appears to be that sustaining a death sentence

> in circumstances like those here results in a sentencing system that invites the death penalty "to be...wantonly and...freakishly imposed." *Lewis v. Jeffers,* 497 U.S. 764, 774, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (quoting *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)).

Id., at 186. Whether framed as an "inherently unreliable sentence" in violation of the Eighth Amendment, or as a sentence imposed under "a fundamentally unfair procedure" in violation of "the basic due process standard," the overriding constitutional issue here is the same as that presented in *Bradshaw*: a death sentence based upon a lie cannot stand.

In rejecting Van Poyck's "*Bradshaw* claim", the majority below first inexplicably stated that "*Bradshaw* is largely limited to its facts and procedural posture" - a strange claim to make about any of this Court's decisions. Pet. App. at A-16. This Decision and underlying reasoning confirms that the question specifically left open in *Bradshaw* (because it did not arrive before this Court accompanied by a lower court ruling on the merits) is now squarely before this Court (now accompanied by a ruling on its merits): to what extent is a death sentence constitutionally undermined where it was predicated upon the subsequently invalidated belief that the defendant was the triggerman? This question deserves to be definitively answered by this Court.

II. WHEN A DEATH SENTENCE IS BASED ON AN AGGRAVATING FACTOR LATER SHOWN TO BE UNTRUE, REVIEWING COURTS IN "WEIGHING" STATES MUST EITHER REWEIGH THE EVIDENCE, APPLY HARMLESS ERROR ANALYSIS, OR REMAND FOR RESENTENCING, AND THE FLORIDA SUPREME COURT DID NONE OF THE THREE

The State now openly concedes that Van Poyck was not the triggerman in Griffis' murder. As noted previously, both the sentencing jury and the sentencing judge found Van Poyck to be the triggerman and the prosecution argues that this was "important" to the sentencing determination, which, of course, is also a matter of "common sense" (as put by dissenting Justice Anstead). As previously explained, the result is a sentencing error of constitutional dimension, either because of a violation of Van Poyck's due process rights, or a violation of his right to have the sentencing jury consider constitutionally relevant evidence.

In "weighing"[2] states a state's highest reviewing court can correct constitutional sentencing error regarding the balance of aggravating and mitigating factors by either: (1) remanding for a new

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[2] On appellate review of death sentences the distinction between weighing and nonweighing sentencing schemes is of "critical importance." *Clemons*, 494 U.S., at 747. This Court has previously noted that "Florida is a weighing state," *Parker v. Dugger*, 498 U.S. 308, 318 (1990); *Sochor v. Florida*, 504 U.S. 527, 532 (1992) (same).

penalty hearing; (2) reweighing the aggravating and mitigating evidence; or, (3) conducting harmless error analysis pursuant to *Chapman v. California*, 386 U.S. 18 (1967). *See, Clemons v. Mississippi*, 494 U.S. 738 (1990) at 748-49; *Stringer v. Black*, 503 U.S. 222, 230-32 (1992).

This Court has consistently held that whichever method of review a State court chooses (reweighing or harmless error analysis) the review is only constitutionally adequate where the court *specifically and clearly* indicates which method it utilized, and where the record *clearly* indicates that the chosen method was actually employed. *See, e.g., Clemons, supra* (vacating Mississippi Supreme Court's affirmance of death sentence where it was not clear that Court actually applied harmless error analysis); *Sochor v. Florida, supra* (reversing Supreme Court of Florida's affirmance of death sentence where it was "far from apparent" that Court applied harmless error analysis); *Parker v. Dugger, supra* (reversing Supreme Court of Florida's affirmance of death sentence where it was unclear whether Court conducted harmless error analysis or attempted to reweigh). In this case, the record shows that the Florida Supreme Court did not adequately reweigh the evidence, did not conduct a harmless error analysis, and, of course, did not remand for resentencing.

A. The Florida Supreme Court Did Not Reweigh the Evidence

As this Court is aware, "the Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and

mitigating evidence." *Parker v. Dugger*, *supra*, at 319; *Sochor v. Florida*, *supra*, at 539 ("We noted in *Parker* that the Supreme Court of Florida will generally not reweigh evidence independently").

In any event, to the extent the Decision can be read to constitute a "reweighing", it is constitutionally inadequate under *Parker* and *Stringer*, both of which hold that for reweighing to be adequate the Court must conduct a "thorough analysis" of *all* of the mitigating evidence. *Parker*, 498 U.S. at 320 ("What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record"). *See also Richmond v. Lewis*, *supra*, at 49 (1992) (finding state Supreme Court review unconstitutional where concurring justices did not even mention mitigating evidence). In his second question presented, *infra*, Van Poyck has detailed the majority's failure to weigh and consider all of his available mitigating evidence.

B. This Court Should Clarify The Standard For Harmless Error Analysis in Death Penalty Cases, But The Florida Supreme Court Did Not Conduct An Adequate Harmless Error Analysis Under Any Standard

This Court has held that harmless error principles apply to capital sentencing. *Satterwhite v. Texas*, 486 U.S. 249 (1988); *Clemons*, *supra*. A reviewing court may label constitutional error harmless only upon determination beyond a reasonable doubt that the error did not contribute to the judgment. *Chapman v. California*, 386 U.S. 18,

22 (1967). The *Chapman* Court held that this formulation was consistent with the standard adopted in *Fahy v. Connecticut*, 375 U.S. 85 (1963), that "[t]he question is whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction." *Chapman*, 386 U.S., at 23 (quoting *Fahy*, 375 U.S., at 86-87.)

In *Clemons* this Court reversed the Mississippi Supreme Court's affirmance of a death sentence following the invalidation of an unconstitutionally vague aggravating circumstance. This Court reversed because the state Supreme Court's opinion failed to *clearly* apply *Chapman*'s harmless error analysis, even though the opinion stated "We likewise are of the opinion beyond a reasonable doubt that the jury's verdict would have been the same with or without the [invalid aggravator]." *Clemons,* 494 U.S., at 744. That "cryptic holding" was insufficient, the *Clemons* Court concluded, to establish that *Chapman's* harmless error analysis had been properly applied.

Likewise, in *Sochor v. Florida*, this Court reversed the Supreme Court of Florida's affirmance of a death sentence following the invalidation of an aggravating circumstance. This Court reversed because the state Supreme Court neither reweighed nor clearly applied harmless error analysis. In a concurring opinion Justice O'Connor stated:

> I join the Court's opinion but write separately to set forth my understanding that the Court does not hold that an appellate court can fulfill its obligations of meaningful review by simply reciting the formula for harmless

> error...[under *Chapman*] the reviewing court must find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"...This is a justifiably high standard...An appellate court's bald assertion that an error of constitutional dimensions was "harmless" cannot substitute for a principled explanation of how the court reached that conclusion...I agree with the court that the Florida Supreme Court's discussion of the proportionality of petitioner's sentence is not an acceptable substitute for harmless error analysis.

Sochor, 504 U.S. at 541 (Justice O'Connor, concurring). This Court's precedents make clear that *Chapman's* harmless error analysis is the only acceptable standard of review where an invalidated aggravating factor has undermined confidence in the sentencer's weighing process. And because, under *Brown v. Sanders*, Van Poyck's invalidated conviction for premeditated murder is a "death eligibility factor" under Florida law which, *Brown* further instructs, makes it the functional equivalent of an aggravating factor, the direct appeal invalidation of Van Poyck's conviction for premeditated murder, as well as the newly discovered evidence establishing that Van Poyck was not the triggerman, likewise undermines confidence in his sentencer's weighing process.

The precise formula of the harmless error test to be used is uncertain. In *Boyde v. California*, 494 U.S. 370 (1990), this Court reviewed a jury

instruction purportedly precluding a capital jury from considering constitutionally relevant mitigating evidence. After initially recognizing that "The legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence is less than clear from our cases," *Boyde*, 494 U.S., at 378, and that "other opinions in this area likewise have produced a variety of tests and standards," *Id.*, at 379, the Court decided that "it is important to settle upon a single formulation for this court and other courts to employ in deciding this kind of federal question." *Id.* The Court then held:

> We think the proper inquiry in such a case is *whether there is a reasonable likelihood* that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence. Although a defendant *need not establish that the jury was more likely than not* to have been impermissibly inhibited, a capital proceeding is not inconsistent with the Eighth Amendment if there is *only a possibility* of such an inhibition.

Boyde, 494 U.S., at 380 (emphasis added). The Court thus established the "reasonable likelihood" standard for use in these types of cases while simultaneously rejecting the requirement that defendants meet the "more likely than not" standard.[3] Following *Boyde* this Court has

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[3] This rejected "more likely than not" standard is, Van Poyck submits, the equivalent of the heightened *Jones v. State* standard employed by the majority below.

consistently employed the "reasonable likelihood" standard in capital cases alleging that sentencers were precluded (usually through a restrictive jury instruction) from considering mitigating evidence. *See, e.g., Penry v. Johnson*, *supra*, at 800 ("There is, at the very least, a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of Penry's [mitigating evidence]"); *Abdul-Kabir v. Quarterman*, *supra*, at 1673-74 (reversing death sentence where "there is a reasonable likelihood that the [jury instructions] would preclude that juror from giving meaningful consideration to such mitigating evidence."); *Brewer v. Quaterman*, 127 S. Ct. 1706, 1712 (2007) ("There is surely a reasonable likelihood that the jurors accepted the prosecutor's argument at the close of the sentencing hearing" that they could not consider the proffered mitigating evidence); *Smith v. Texas,* 127 S. Ct. 1686, 1690, 1698 (2007) (rejecting state court's requirement that defendant show "egregious harm" and reaffirming that death sentence cannot stand where there is "a reasonable likelihood" that jury instruction precluded jury's consideration of mitigating evidence).[4]

This Court has never sanctioned a state reviewing court's utilization of any standard of review more stringent than *Chapman's* harmless-error analysis or *Boyde's* "reasonable likelihood"

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[4] Four Justices of this Court have stated that "As Justice Blackmun explained in [*United States v.*] *Bagley*, the 'reasonable likelihood' standard should be understood to be an equivalent of the 'harmless error' standard adopted in *Chapman v. California*." *Boyde, supra*, 494 U.S., at 393 (Justices Marshall, Brennan, Blackmun and Stevens, dissenting).

standard when evaluating a death sentence which has been undermined by the jury's inability to weigh, consider and give meaningful effect to constitutionally relevant mitigating evidence. The majority below erred in employing its heightened *Jones* standard which put the burden of proof on Van Poyck to show that the omitted evidence "probably would have resulted in a lesser sentence."

C. When Reweighing And/Or Harmless Error Analysis Is Inadequate To Correct This Error, Remand For Resentencing Is Necessary

In *Clemons*, *supra*, this Court recognized that in certain cases the basis for the death sentence may be so capricious or speculative that neither reweighing nor harmless error analysis can save the sentence: "In some situations, a state appellate court may conclude that peculiarities in a case make appellate reweighing or harmless error analysis extremely speculative or impossible." *Clemons,* 494 U.S. 738, at 754. For example, just last term in *Smith v. Texas,* 127 S. Ct. 1686 (2007), in reversing a death sentence upon a finding that there was "a reasonable likelihood" that the jury was precluded from considering constitutionally relevant mitigating evidence, (*i.e., Penry I* error), Justice Souter observed that, "In some later case, we may be required to consider whether harmless error review is ever appropriate in a case with [*Penry I*] error. We do not and need not address that question here." *Smith*, 127 S.Ct. at 1699 (Justice Souter, concurring).

Although Van Poyck maintains that the Florida Supreme Court has conducted neither

adequate reweighing nor adequate harmless error analysis, in the alternative, Van Poyck submits that the reliability of this death sentence has been so undermined that neither appellate court reweighing nor harmless error analysis is sufficient to correct the errors. First, this death sentence stands tainted by the "double whammy" of being predicated upon affirmatively false, subsequently invalidated sentencing factors while simultaneously being imposed by sentencer's unable to weigh, consider and given meaningful effect to constitutionally relevant mitigating evidence. Second, as three Justices of the Florida Supreme Court have stated, there exists "a vast array of mitigating evidence of the most serious nature that should have been thoroughly investigated and presented at the original penalty phase." *Van Poyck v. State*, 694 So. 2d at 699-700 (Justices Anstead, Shaw and Kogan, dissenting). In the view of these three Justices that mitigation alone was sufficient to create "a reasonable probability" that Van Poyck's jury would have returned a lesser sentence. *Id.*

Finally, the reliability of this death sentence, now solely predicated upon a non-triggerman, felony murder theory is further undermined where Van Poyck's sentencers, erroneously believing he was a triggerman guilty of premeditated murder, never made the mandatory threshold *Tison v. Arizona* factual findings which were a prerequisite to making Van Poyck death eligible in the first instance. In evaluating whether the new mitigating evidence might have resulted in a lesser sentence the majority below should have initially considered the possibility that the sentencers might not have even found Van Poyck death eligible under *Tison* had they *known* he

was not the triggerman. Absent the jury's *Tison* findings the balance of mitigating and aggravating factors becomes irrelevant because Van Poyck could not have been sentenced to death as a matter of law. That the Supreme Court of Florida later made its own *Tison* findings on direct appeal does not moot this concern because the inquiry below was focused on what *the jury* would have done. This *Tison* ramification, never acknowledged by the majority below, only injects more undue speculation into the analysis, militating against affirmance of the sentence and supporting the case for a new sentencing hearing. Accord, *Clemons*, 494 U.S., at 772 ("[The]he more deeply tainted the jury's verdict, the more difficult it is to say with assurance what the verdict would have been had the taint been eliminated.") (Justice Blackmun, concurring in part and dissenting in part). Certiorari review is warranted here to resolve these claims.

CONCLUSION

WHEREFORE, based upon the foregoing this Court should grant *certiorari* review to answer the questions presented.

Respectfully submitted,

/s/_____

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APPENDIX

May 3, 2007, Opinion by the Supreme Court of Florida affirming trial court's denial of Van Poyck's Motion for Postconviction Relief	A-1-22
July 16, 2007, Order by the Supreme Court of Florida denying Van Poyck's Motion for Rehearing and/or Clarification	B-1-2
Van Poyck v. State, 564 So.2d 1066 (Fla. 1990)	C-1-11
Van Poyck v. State, 908 So.2d 326 (Fla. 2005)	D-1-15
Van Poyck v. State, 694 So.2d 686 (Fla. 1997)	E-1-42
December 21, 1988, Sentencing Order by the Circuit Court, Fifteen Judicial Circuit of Florida, in and for Palm Beach County	F-1-6
Jury Verdict Form	G-1-11
Van Poyck's May 18, 2007, Motion for Rehearing and/or Clarification Filed in the Supreme Court of Florida	H-1-6
Constitutional Provisions Involved	I-1

APPENDIX A
SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,
Appellant,

v. No. SC05-1513

STATE OF FLORIDA,
Appellee.

[May 3, 2007]

PER CURIAM:

William Van Poyck, who is under a sentence of death, appeals the denial of his successive motion for postconviction relief. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. The motion relies on an affidavit by a former prison inmate claiming that Van Poyck's codefendant, Frank Valdes, confessed that he committed the murder for which both he and Van Poyck were sentenced to death. Based on decisions in previous appeals rejecting related claims concerning the identity of the triggerman, including our affirmance in 2005 of the denial of DNA testing, we affirm the trial court's order.

Facts and Procedural History

Prior Proceedings

Van Poyck was convicted of first-degree murder and sentenced to death for the killing of correctional officer Fred Griffis. The murder occurred during an attempt by Van Poyck and Valdes[1] to free Van Poyck's friend, James O'Brien, from a prison van while he was being taken by Griffis and another correctional officer, Steven Turner, to a doctor's appointment outside prison. Our opinion in Van Poyck's direct appeal explained the circumstances of the murder:

> Griffis, who was not armed, drove the van while Turner watched O'Brien, who was secured in a caged area behind Griffis. After Griffis pulled the van into an alley behind the doctor's office, Turner looked down for his paperwork. Upon looking up, he saw a person, whom he later identified as Van Poyck, aiming a pistol at his head. Van Poyck ordered Turner to exit the van. At the same time, Frank Valdez, an accomplice of Van Poyck's, went to the driver's side of the van. Turner testified that Van Poyck took his gun, ordered him to get under the van, and kicked him while he was attempting to comply with Vail Poyck's order. He testified that, while under the van, he saw Griffis exit the van; he noticed another person forcing Griffis to the back of

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[1] The codefendant's name is alternatively spelled "Valdez" in some court documents.

> the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground. Turner further stated that Van Poyck had stopped kicking him when the gunfire started, but noted that he did not know where Van Poyck was at the time of the shooting. Griffis was shot three times, once in the head and twice in the chest. Expert testimony indicated that the shot to the head was fired with the barrel of the gun placed against Griffis' head and that each of the wounds would have been fatal. It was also determined that the murder weapon was a Hungarian Interarms nine millimeter semiautomatic pistol.

Van Poyck v. State, 564 So. 2d 1066, 1067 (Fla. 1990) (*Van Poyck*).

The jury found Van Poyck guilty of first-degree murder and, at the conclusion of the penalty phase, recommended the death penalty by a vote of eleven to one. The trial court found four aggravating factors[2] and nothing in mitigation. Concerning Van Poyck's role in the murder, the court found:

> Mr. Van Poyck is an individual who is quite intelligent and very knowledgeable as to the

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[2] The aggravators were: (1) the murder was committed while Van Poyck was under a sentence of imprisonment, (2) Van Poyck was previously convicted of violent felonies, (3) Van Poyck knowingly placed many persons at great risk, and (4) the murder was committed to effect an escape.

> law and that he himself admits that he was well aware of the law including felony murder, that he himself was the individual who planned this operation who retained Mr. Valdez to assist him and who checked the guns on the way to the location where this murder occurred to see to it that they were loaded. By all evidence Mr. Van Poyck was a major participant in this murder.
>
> The Court further finds that the State clearly presented competent and substantial evidence as to the crime of first degree felony murder and or first degree premeditated murder and in reality presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.

Van Poyck was sentenced to death.

This Court affirmed Van Poyck's murder conviction and death sentence. We concluded that the conflicting evidence on Van Poyck's whereabouts when Griffis was shot rendered the evidence legally insufficient to prove premeditated murder. *Van Poyck I*, 564 So. 2d at 1069. However, we rejected Van Poyck's claim that he "was a minor actor and did not have the culpable mental state to kill" required for imposition of the death penalty on a defendant who was not the actual killer. *Id.* at 1070. We stated:

> Although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdez arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional.

Id. at 1070-71.

Subsequently, this Court affirmed the denial of Van Poyck's initial motion for postconviction relief. *Van Poyck v. State*, 694 So. 2d 686 (Fla. 1997) (*Van Poyck II*). Among other issues addressed, we rejected Van Poyck's claim that "the judge and jury weighed the invalid aggravating factors that the murder was premeditated or that Van Poyck was the triggerman," concluding that the challenge to the conviction for premeditated murder was resolved in the direct appeal. *Id.* at 698 & n.6.[3]

The United States District Court for the Southern District of Florida denied Van Poyck's petition for a writ of habeas corpus, and the Eleventh

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[3] Van Poyck raised the issue of consideration by the jury and the trial court of evidence that he was the triggerman again in a petition for a writ of habeas corpus. We denied the petition and concluded that the claim was procedurally barred because it was raised and rejected in the direct appeal and determined to be procedurally barred in the postconviction appeal. *Van Poyck v. Singletary*, 715 So. 2d 930, 931 (Fla. 1998).

Circuit affirmed. *See Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318 (11th Cir. 2002) (*Van Poyck III*). The Eleventh Circuit addressed two issues relevant to the current proceedings. The first issue was whether Van Poyck's trial counsel was ineffective in failing to present evidence that Valdes' clothing had blood matching Griffis's blood type, that Valdes' girlfriend purchased the murder weapon, and that the murder weapon was in Valdes' possession when he and Van Poyck left to commit the crime. The Eleventh Circuit concluded that although this Court had not addressed the issue, it could reasonably have found that Van Poyck suffered no prejudice from any deficiency. *Id.* at 1325. The Eleventh Circuit observed that the State presented no evidence at the penalty phase that Van Poyck was the triggerman, and that although the prosecutor suggested several times in closing argument that Van Poyck killed Griffis, its case for the death penalty rested mainly on the four aggravating factors and Van Poyck's role as a major participant in the underlying felony. *Id.* at 1325-26. The Eleventh Circuit stated:

> Especially because the prosecutor's main argument was that the death penalty was appropriate regardless of who the triggerman was, we see no reasonable probability that, if Counsel had presented the additional evidence that Petitioner was not the triggerman, the outcome of the sentencing phase would have been different. The Florida Supreme Court could reasonably conclude that no prejudice existed. The Florida Supreme Court did

> reasonably conclude that the triggerman-evidence claim entitled Petitioner to no relief.

Id. at 1326.

The Eleventh Circuit also rejected Van Poyck's claim that the jury and trial court improperly considered evidence that Van Poyck was the triggerman. The court concluded that because the evidence of premeditation was insufficient, it had "no good reason to think that the jury relied on something more than the factually supported theory of felony murder." *Id.* at 1329. The Eleventh Circuit also noted that "whether [Van Poyck] was actually the triggerman was of only minimal importance during the prosecutor's closing." *Id.* Finally, the Eleventh Circuit concluded that the trial court's statement that the State presented competent evidence that Van Poyck may have been the triggerman "does not mean that the trial court had found, beyond a reasonable doubt, that Petitioner was the triggerman. And, it certainly does not mean that the trial court relied upon Petitioner's role as triggerman as some kind of aggravating factor." *Id.* at 1330.

In 2005, this Court affirmed the trial court's denial of Van Poyck's request under Florida Rule of Criminal Procedure 3.853 for DNA testing of clothing Valdes and Van Poyck were wearing when Griffis was killed. *See* Van *Poyck v. State*, 908 So. 2d 326, 330 (Fla. 2005) (*Van Poyck IV*). Citing to the Eleventh Circuit opinion in *Van Poyck III*, we relied on the lack of emphasis on the identity of the

triggerman in the penalty phase and the trial court's sentencing order. We also pointed to our conclusion in the direct appeal that Van Poyck was the instigator and a major participant in the crime. We concluded that "there is no reasonable probability that Van Poyck would have received a lesser sentence had DNA evidence establishing that he was not the triggerman been presented at trial." *Id.*

Current Proceedings

In 2005, while his appeal in *Van Poyck IV* was still pending, Van Poyck filed a successive motion for postconviction relief asserting that an affidavit by a prison acquaintance of Valdes constituted newly discovered evidence. In the affidavit, Enrique Diaz stated that between 1990 and 1997, Valdes "repeatedly and consistently" said he had shot and killed Griffis. Diaz explained that he delayed reporting these conversations until he was released from prison in August 2004 because he feared for his life, a concern that was "reinforced when F.S.P. guards murdered Frank Valdes in his cell while [he] was there at F.S.P."

The trial court denied Van Poyck's motion without an evidentiary hearing, finding that it was untimely, that the Diaz affidavit did not constitute newly discovered evidence, and that "all of the defendant's grounds for relief have been fully addressed" in the opinions of this Court and the Eleventh Circuit. Van Poyck appeals from that order. He recognizes that our decision in *Van Poyck*

IV is controlling, but asks us to reconsider that decision.

ANALYSIS

Governing Standards

Florida Rule of Criminal Procedure 3.851 governs the timeliness of, and necessity of an evidentiary hearing on, successive postconviction motions in final capital cases. Rule 3.851(d)(1) bars a postconviction motion filed more than one year after a judgment and sentence are final. An exception to this rule permits otherwise untimely motions if the movant alleges that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A). Rule 3.851(t)(5)(B) permits denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief."

This Court's precedent provides the criteria for obtaining a new capital penalty phase based on newly discovered evidence. In addition to demonstrating that the evidence could not have been discovered previously through the exercise of due diligence, the defendant must establish that the newly discovered evidence probably would have produced a life sentence. *Ventura v. State*, 794 So. 2d 553, 571 (Fla. 2001); *see also Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) ("[T]he newly discovered

evidence must be of such nature that it would *probably* produce an acquittal on retrial."); *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992) ("The *Jones* standard is also applicable where the issue is whether a life or death sentence should have been imposed.").

Because the trial court denied Van Poyck's motion solely on the basis of the pleadings, making a legal rather than a factual determination, this Court evaluates each of these matters de novo. *See State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003) (holding that "pure questions of law" that are discernible from the record "are subject to de novo review").

Timeliness and Due Diligence

Apart from stating that the information in the Diaz affidavit was not newly discovered, the trial court made no findings as to whether Van Poyck could have obtained the information earlier with the exercise of due diligence. In its response below, the State declined to assert this as a ground for denying Van Poyck's motion. The State also did not press the untimeliness of Van Poyck's motion as a basis for affirmance. Consequently, we accept the statement in the Diaz affidavit that he did not come forward sooner for fear of his life, and conclude that the motion, files, and records do not conclusively show that Van Poyck's newly discovered evidence claim is untimely under rule 3.851.

Probability of a Life Sentence

In denying Van Poyck's motion, the trial court pointed out that opinions of this Court and the Eleventh Circuit have "essentially held that even though the defendant was not the `triggerman,' the imposition of the death penalty was fair, just, and proportional." The trial court made no finding on the dispositive question of whether the contents of the affidavit, if taken as true, would probably produce a sentence of life imprisonment as the sole alternative to the death penalty.

On the question of whether the new evidence, if believed, would probably yield a life sentence, *Van Poyck IV* is controlling. There, relying on *Van Poyck I* and *Van Poyck III*, we determined that new evidence on the identity of the triggerman would not create a reasonable probability of a lesser sentence. 908 So. 2d at 330. The "reasonable probability" standard from rule 3.853, which we applied in *Van Poyck IV* to affirm the denial of DNA testing, actually presents a lower hurdle for defendants than the *Jones* standard governing Van Poyck's current claim.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court adopted the prejudice standard of a reasonable probability of a different result for claims of ineffective assistance of counsel and rejected the higher standard governing newly discovered evidence claims. In distinguishing the two tests of prejudice, the Court stated that "[t]he result of a proceeding can be

rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The *Jones* standard for newly discovered evidence requires that the new evidence be such that it would probably produce an acquittal or a sentence of life imprisonment on retrial. Having decided in *Van Poyck IV* that new evidence showing that Valdes was the triggerman would not create a "reasonable probability" of a different result, we are bound to conclude here that different evidence on the same fact would not "probably" create a different result.

Recognizing that *Van Poyck IV* is controlling as to his current claim, Van Poyck asks us to reconsider that decision. He relies in part on several opinions in which this Court noted the importance of triggerman status on the death-sentencing decision, and on a recent United States Supreme Court decision concerning new evidence on the identity of the triggerman in a capital case. We conclude that none of these decisions compels us to recede from *Van Poyck IV*.

In *Barrett v. State*, 649 So. 2d 219 (Fla. 1994), we reversed a first-degree murder conviction for a new trial on a different issue and ruled that the defendant could not be sentenced to death on remand because the trial court erred in overruling a life recommendation that could have rested in part on the jurors' conclusion that a codefendant committed

the murder. *Id.* at 223. Similarly, in *Cooper v. State*, 581 So. 2d 49 (Fla. 1991), this Court reversed the trial court's override of a jury's life recommendation, noting that the evidence supporting the trial court's determination that the defendant committed the killing was "far from certain" and that "[c]onflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment." *Id.* at 51.

In *Downs v. State*, 572 So. al 895 (Fla. 1990), this Court ruled that the trial court committed error, albeit harmless, when it excluded testimony in a new penalty phase that corroborated other testimony indicating that the defendant was not the triggerman. *Id.* at 899, The Court considered this evidence relevant to the circumstances of his participation in the crime, which, if true, would have been valid mitigation under the "minor participation" statutory mitigator. *Id.* (citing to § 921.141(6)(d), Fla. Stat. (1975)). In *Zerquera v. State*, 549 So. 2d 189 (Fla. 1989), the Court reversed a murder conviction because the trial court erroneously sustained objections to testimony that bullets of the same caliber used in the killing were discovered in a codefendant's belongings. *Id.* at 191-92. Dissenting in part, Justice Grimes stated that he would have granted only a new penalty phase. He concluded that "the question of who did the actual shooting directly bears on whether Zerquera should receive the death penalty." *Id.* at 193 (Grimes, J., concurring in part and dissenting in part).

In this case, unlike *Barrett* and *Cooper*, in which the jury recommended a life sentence, the trial court followed an eleven-to-one jury recommendation in imposing the death penalty. Further, unlike *Downs* and *Zerquera*, the issue here does not concern evidence on the identity of the triggerman excluded by the trial court. These decisions do not compel reconsideration of the Court's 2005 decision in this case or an evidentiary hearing on the present newly discovered evidence claim.

In reaching this conclusion, we consider our recent decision in *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006), which presented the same issue we now face here. In *Diaz*, this Court affirmed the summary denial of a newly discovered evidence claim based on an affidavit bearing on the identity of the triggerman in a case involving codefendants. The affiant was a fellow prisoner, Gajus, who had testified against Diaz at trial. *Id.* at 1146. The Court noted that the affidavit "[did] not recant his trial testimony on the critical issue of whether Diaz made a statement about being the shooter," but concluded that "even if the Gajus affidavit was considered a recantation of the trial testimony, it would not probably yield a less severe sentence." *Id.* at 1146-47.

In *Diaz*, the Court relied on its determination in the direct appeal that Diaz's actions made death a proportional punishment under *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987), and on the postconviction court's specific finding "that in the sentencing order the trial judge indicated that whether Diaz was the shooter did not

impact the final sentence." *Diaz*, 945 So. 2d at 1147. We also quoted with approval the sentencing order's explanation for rejecting the statutory mitigator that the defendant was a minor participant in the crime. *Id.*

As in *Diaz*, the trial court in this case found that the death penalty was justified for Van Poyck independent of evidence regarding the identity of the triggerman. The trial court noted that Van Poyck checked the guns to ensure that they were loaded while traveling to the location where the murder occurred, and concluded that "[b]y all evidence Mr. Van Poyck was a major participant in the murder." At most, non-triggerman status would have constituted nonstatutory mitigation which, considering the four aggravating factors and absence of other mitigation, would probably not have yielded a lesser sentence.

Finally, we address Van Poyck's reliance on *Bradshaw v. Stumpf*, 545 U.S. 175 (2005). In that case, Stumpf pled guilty to a capital murder committed during a robbery. *Id.* at 179. The State argued in Stumpf's sentencing proceeding that he was the triggerman in a murder committed during a robbery, and obtained a sentence of death. As in this case, the prosecutor also asserted that the death penalty was appropriate even if Stumpf was not the shooter, "because the circumstances of the robbery provided a basis from which to infer Stumpf's intent to cause death." *Id.* at I 80. Subsequently, the State obtained information after Stumpf was sentenced that the codefendant, Wesley, admitted to a fellow

inmate that he had shot the victim. The prosecution used the inmate's testimony to seek the death penalty in Wesley's trial. Wesley countered this evidence by pointing to the prosecutor's contradictory position in Stumpf s trial and Stumpf's resulting sentence of death. Wesley was sentenced to life imprisonment. *Id.*

The Supreme Court determined that "the precise identity of the triggerman was immaterial to Stumpf's conviction for aggravated murder" and reversed the Sixth Circuit's decision voiding Stumpf s guilty plea based on the new evidence. *Id.* at 187. However, the Court determined that "it is at least arguable that the sentencing panel's conclusion about Stumpf's principal role in the offense was material to its sentencing determination." *Id.* Because the Court found that it was "not clear whether the Court of Appeals would have concluded that Stumpf was entitled to resentencing had the court not also considered the conviction invalid," it remanded for reconsideration of the effect of the inconsistencies on the sentence. *Id.*

Bradshaw is largely limited to its facts and procedural posture. Its mandate was simply to reconsider the effect of the new evidence on the sentence, an issue the lower court had not reached because it had erroneously reversed the conviction. In addition, *Bradshaw* involves a due process claim grounded in inconsistent positions taken by the prosecution in trials of codefendants, which is not an

aspect of this case.[4] To the extent that *Bradshaw* has any bearing on this case, it stands for the proposition that new evidence concerning the identity of the triggerman is "material" to a death sentencing determination. This Court's 2005 opinion in this case includes the same acknowledgment:

> We do not hold . . . that it makes no difference in the capital sentencing process which of two codefendants actually committed the killing. Rather, we determine only that under the circumstances of this case involving a murder of a prison guard in a brutal armed attack planned by Van Poyck and carried out with Valdez, DNA evidence indicating that Van Poyck was not the triggerman would not have created a reasonable probability of a lesser sentence.

Van Poyck IV, 908 So. 2d at 330. Therefore, *Bradshaw* does not require reconsideration of the 2005 decision.

CONCLUSION

The issue before us is whether Van Poyck is entitled to an evidentiary hearing on his claim

---

[4] In the opinion in Valdes' direct appeal from his conviction and sentence of death, this Court again recounted the testimony by Turner that he could not tell who shot Griffis. *Valdes v. State*, 626 So. 2d 1316, 1318 (Fla. 1993). The Court found substantial, competent evidence to support the trial court's rejection of the mitigator of minor participation by an accomplice, and stated that its characterization of Van Poyck as the major participant "[did] not mean Valdes' participation was minor." *Id.* at 1324.

asserting newly discovered evidence that Valdes was the triggerman in the murder of Griffis. We conclude that he is not. In *Van Poyck I*, we determined that Van Poyck's death sentence was a proportional punishment even though the evidence of premeditation was insufficient because the evidence was inconclusive on Van Poyck's whereabouts during the murder. In *Van Poyck II*, we rejected his claim that the jury and trial court invalidly considered as nonstatutory aggravation that the murder was premeditated or that Van Poyck was the triggerman, concluding that the issue had been resolved on direct appeal. In *Van Poyck III*, the United States Court of Appeals for the Eleventh Circuit concluded that additional evidence that Valdes was the triggerman would not have changed the outcome of the penalty phase. Finally, in *Van Poyck IV*, we ruled that DNA evidence proving that Valdes was the triggerman would not have created a reasonable probability of a different sentence for Van Poyck. Based on these decisions, particularly *Van Poyck IV*, which relies on the others and to which we adhere, we conclude that testimony by a former fellow inmate that Valdes confessed to being the triggerman in Griffis's murder probably would not have yielded a life sentence for Van Poyck. Accordingly, we affirm the trial court's summary denial of his successive motion for postconviction relief.

It is so ordered.

LEWIS, C.J., and WELLS, PARIENTE, QUINCE, CANTERO, and BELL, B., concur.

ANSTEAD, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

ANSTEAD, J., dissenting.

I cannot agree with the majority that appellant's claim of new evidence does not merit a trial court hearing to evaluate its credibility and its weight, as well as its potential impact on his sentence of death.

Previously, this Court has rejected as immaterial appellant's claim that DNA evidence would demonstrate that he was not the actual killer in the homicide for which he has been sentenced to death. The appellant has now returned to this Court with essentially the same claim, but with substantial additional evidence that he was not the killer. He concedes that such evidence would not affect his conviction for first-degree murder, but asserts that it could affect his sentence of death. For the same reasons set out in my previous dissent, I cannot join in the majority's analysis and conclusion summarily rejecting this assertion:

> We need only examine the trial record in this case to see explicit proof that the identity of the triggerman was both important and at issue in the jury's assessment of the appropriate penalty for Van Poyck. In this case, the prosecutor expressly argued to the

jury during the penalty phase: "So again, it is important who the triggerman is. There is no doubt about it. It's important to your deliberations, okay." Subsequent to those statements the prosecutor told the jury: "So ladies and gentlemen, even though he says he was not the triggerman, I submit the evidence shows that he was, because the only eyewitness we have that actually saw the guns well enough to identify is Officer Turner. He is the one left alive here to tell you who had what gun." [n.5] Thus, there can be no doubt that the prosecution, in seeking the death penalty, asserted to the jury first, that it was important in their deliberations on the penalty to determine who the triggerman was, and, second, in this case, the evidence supported a determination that the defendant was the triggerman. The jury, of course, after this argument, returned with a recommendation for death. [n.6]

[N.5.] In addition, the trial court stated in its sentencing order:

> The Court further finds that the State clearly presented competent and substantial evidence as to the crime of first degree felony murder and or first degree pre-meditated murder and in reality presented competent evidence that Mr, Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.

> [N.6.] This, of course, is the same jury that we determined was in error in finding the defendant guilty of premeditated murder.
>
> On the face of this record how can we possibly now conclude that the identification of the triggerman is irrelevant to the determination of whether the death penalty should be imposed? The prosecutor has already answered that question for us. The majority has chosen to deal with a hypothetical situation: could the death penalty be imposed on a non-triggerman, rather than dealing with the actual situation presented here where the State sought the death penalty, asserting as grounds that the defendant was the triggerman, and the jury returned with a vote for the death penalty.

Van Poyck v. State, 908 So. 2d 326, 331-32 (Fla. 2005) (Anstead, J. dissenting). Once again, the majority has erroneously predicated its summary rejection on the hypothetical situation of a case for the death penalty based solely upon the defendant's participation in the underlying felony offense of escape, rather than confronting the actual circumstances of this case, which included a prosecution claim that Van Poyck was the actual killer. The majority has essentially substituted its views for those of a sentencing jury in concluding that the identity of the actual killer would make no difference to a jury considering life or death.

An Appeal from the Circuit Court in and for Palm Beach County,

Richard I. Wennet, Judge - Case Nos. 87-CF006736 A02 and 88-CF011116 A02

Mark Olive, Tallahassee, Florida, Benjamin B. Brown of Quarles and Brady, LLP, Naples, Florida, Jeffrey 0. Davis and Lauri A. Rollings of Quarles and Brady, LLP, Milwaukee, Wisconsin,

for Appellant

Bill McCollum, Attorney General, Tallahassee, Florida, Celia A Terenzio, Assistant Attorney General, West Palm Beach, Florida,

for Appellee

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APPENDIX B

SUPREME COURT OF FLORIDA
Friday, July 15, 2005
CASE NO.: SC04-696
Lower Tribunal Nos.: 87 CF006736 A02,
88 CF011116 A02

WILLIAM VAN POYCK vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing and/or Clarification is hereby denied.

PARIENTE, C.J., and WELLS, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.
ANSTEAD, J., dissent.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court
kb
Served:
TERRI SKILES
JEFFREY O. DAVIS
MARK E. OLIVE

CELIA A. TERENZIO
HON. RICHARD I. WENNET, JUDGE
HON. SHARON BOCK, CLERK

APPENDIX C

SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,
Appellant,

v. No. 73,662

STATE OF FLORIDA,
Appellee.

[July 5, 1990]
Rehearing Denied Sept. 4, 1990

PER CURIAM:

William Van Poyck appeals his convictions for first-degree murder, attempted first-degree murder, aiding in an attempted escape, aggravated assault, and six counts of attempted manslaughter and his sentence of death imposed for the first-degree murder conviction. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm Van Poyck's convictions and sentences.

The record establishes that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a state prison inmate, in a van from Glades Correctional Institute to a dermatologist's office for an examination. Griffis, who was not armed, drove the van while Turner watched O'Brien, who was secured in a caged area behind Griffis. After Griffis pulled the van into an

alley behind the doctor's office, Turner looked down for his paperwork. Upon looking up, he saw a person, whom he later identified as Van Poyck, aiming a pistol at his head. Van Poyck ordered Turner to exit the van. At the same time, Frank Valdez, an accomplice of Van Poyck's, went to the driver's side of the van. Turner testified that Van Poyck took his gun, ordered him to get under the van, and kicked him while he was attempting to comply with Van Poyck's order. He testified that, while under the van, he saw Griffis exit the van; he noticed another person forcing Griffis to the back of the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground. Turner further stated that Van Poyck had stopped kicking him when the gunfire started, but noted that he did not know where Van Poyck was at the time of the shooting. Griffis was shot three times, once in the head and twice in the chest. Expert testimony indicated that the shot to the head was fired with the barrel of the gun placed against Griffis' head and that each of the wounds would have been fatal. It was also determined that the murder weapon was a Hungarian Interarms nine millimeter semiautomatic pistol.

After Griffis was shot, Turner was forced to get up from under the van and look for the keys. Upon realizing that Turner did not have them, Valdez fired numerous shots at a padlock on the van in an attempt to free O'Brien. One of the shots ricocheted off of the van and struck Turner, causing him minor injuries. Turner testified that at around

this time Van Poyck aimed the Hungarian Interarms semiautomatic nine millimeter pistol at him and pulled the trigger. Although no bullet was fired, Turner stated that he heard the gun click. Turner then fled the scene when Van Poyck turned his attention to Valdez, who was smashing one of the windows on the van. After Van Poyck noticed that two cars had just driven into the alley, he and Valdez approached the cars and Van Poyck shattered the windshield of one of the cars with the butt of a gun. Van Poyck and Valdez then ran to a Cadillac parked in an adjacent parking lot and departed from the scene. A police officer, who arrived at the scene and witnessed the two men leaving, radioed for help and a chase followed. During the chase, Van Poyck leaned out of the car window and fired numerous shots at the police cars in pursuit, hitting three of them.

Valdez eventually lost control of the Cadillac and the car crashed into a tree. Van Poyck and Valdez were immediately taken into custody and four pistols were recovered from the car: a Hungarian Interarms nine millimeter semiautomatic pistol, a Sig Sauer nine millimeter semiautomatic pistol, a Starr .22 caliber semiautomatic pistol, and Turner's Smith and Wesson .38 caliber service revolver.

Van Poyck, testifying in his own behalf, denied that he shot Griffis and stated that, while kicking Turner, he heard the gunshots and saw Griffis fall to the ground. He did, however, acknowledge that he planned the operation and recruited Valdez to assist him in his plan. Additionally, he stated that they took three guns with them.

The jury found Van Poyck guilty of first-degree murder, six counts of attempted manslaughter, armed robbery with a firearm, aggravated assault, and aiding in an attempted escape. With regard to the first-degree murder charge, the jury was given a special verdict form which contained blanks for "premeditated murder," "felony murder," and "both." The jury returned the verdict form with "felony murder" and "both" checked and "premeditated murder" left blank.

In the penalty phase, the state presented Van Poyck's parole officer who testified that Van Poyck was on parole at the time of the incident and that he had three previous convictions, two for robbery and one for burglary. Other witnesses for the state included victims of these offenses. Van Poyck presented five witnesses in mitigation, including himself. A nurse from the Palm Beach County jail stated that he helped other inmates in various ways. His brother, who was also in prison, testified about their home life, explaining that their father was frequently away from home on business and their mother had passed away when Van Poyck was young. Van Poyck's aunt testified that for a period of time the family lived with a housekeeper, who appeared to be strange and unstable. Van Poyck's stepmother testified about his family situation, noting that his brother and sister had juvenile records. She also indicated that Van Poyck felt remorse for his actions. Finally, Van Poyck testified in his own behalf, taking responsibility for the fact that Griffis was killed and expressing remorse for his

actions.

By an eleven-to-one vote, the jury recommended the death sentence for the first-degree murder conviction. The trial judge imposed the death sentence and found the following four aggravating circumstances: (1) that the crime was committed while Van Poyck was under a sentence of imprisonment in that he was on parole when he committed the act; (2) that the crime was committed for the purpose of effecting an escape from custody; (3) that Van Poyck knowingly created a great risk of death to many persons; and (4) that Van Poyck was previously convicted of another felony involving the use or threat of violence to some person. In finding insufficient mitigating evidence to override the above aggravating factors, the trial judge stated in his order:

> The defendant presented evidence which attempted to show that he was under the influence of another person, to wit: his brother and/or Mr. O'Brien. This court finds that the evidence was totally lacking to establish in any way that mitigating factor based upon the fact that he clearly had had no contact with his brother for numerous years other than by infrequent letter- writing and that he had in fact not seen Mr. O'Brien for a long period of time. Further, the defendant admitted on the stand that he was operating during the commission of this offense as a person responsible for his own acts and with knowledge of what he was doing.

The judge also rejected evidence of a difficult childhood:

> The only other potential mitigating circumstances for which evidence was presented was that ... Van Poyck's mother died when he was approximately eighteen (18) months of age. However, it was shown that he was subsequently raised in a good family and by people that cared for him. Further, the court would note that Mr. Van Poyck is an individual who is quite intelligent and very knowledgeable as to the law and that he himself admits that he was well aware of the law including felony murder, that he himself was the individual who planned this operation.

The trial court also imposed upon Van Poyck six fifteen-year sentences for the six counts of attempted manslaughter, five years with a mandatory minimum of three for aggravated assault, fifteen years for aiding in an attempted escape, and life imprisonment for attempted first-degree murder. The trial judge stated that each of the above sentences should run consecutively.

Guilt Phase

Van Poyck raises the following six issues in the guilt phase of this appeal: (1) the trial court erred in not severing the multiple offenses in this case; (2) the evidence was insufficient to support a

conviction for first-degree premeditated murder; (3) the evidence was insufficient to support a conviction for attempted first-degree murder; (4) the evidence was insufficient to support a conviction for aiding in an attempted escape; (5) the evidence was insufficient to support the convictions of six counts of attempted manslaughter; and (6) the convictions in issue (5) violated the rule of lenity.

With reference to the first claim regarding severance, all of the crimes arose out of a single criminal episode, which began with the unsuccessful attempt to free a prisoner and concluded in a police chase. We find that the trial court's denial of Van Poyck's motion to sever was consistent with Florida Rules of Criminal Procedure 3.150(a) and 3.152(a). *Bundy v. State,* 455 So.2d 330 (Fla.1984), *cert. denied,* 476 U.S. 1109, 106 S.Ct. 1958, 90 L.Ed.2d 366 (1986); *Spivey v. State,* 533 So.2d 306 (Fla. 1st DCA 1988).

With regard to point two, we agree with Van Poyck that the evidence is insufficient to establish first-degree *premeditated* murder. The state's evidence was conflicting as to where Van Poyck was at the time of the killing. We note that the trial judge, in his sentencing order, was not sure of Van Poyck's whereabouts: "Van Poyck *may* have in fact been the individual who pulled the trigger and shot Fred Griffis." (Emphasis added.) Although the evidence was insufficient to establish first-degree premeditated murder, we find that the evidence was clearly sufficient to convict him of first-degree felony murder. While this finding does not affect Van

Poyck's guilt, it is a factor that should be considered in determining the appropriate sentence.

The remaining issues concerning the sufficiency of the evidence and the violation of the rule of lenity are without merit. The evidence in this record clearly sustains those convictions.

Penalty Phase

Van Poyck raises fifteen issues in the penalty phase: (1) the trial court failed to properly consider the mitigating evidence; (2) the aggravating circumstance of knowingly creating a great risk of death to many persons is vague, overbroad, and capricious; (3) the trial court erroneously found the aggravating circumstance of knowingly creating a great risk to many persons; (4) the trial court erred in denying Van Poyck's request for limiting jury instructions on the aggravating circumstance of knowingly creating a great risk of death to many persons; (5) the trial court failed to direct the jury to make a mandatory factual determination concerning Van Poyck's participation as prescribed by the United States Supreme Court's decisions in *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), and *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); (6) the trial court failed to make the required factual findings required by *Tison* and *Enmund* in its sentencing order; (7) the trial court violated Van Poyck's right to a fair trial by refusing to excuse pro-death jurors and attempting to exclude jurors opposed to the death penalty; (8) Florida's death penalty statute is

unconstitutional as applied to this case; (9) the trial court gave Van Poyck insufficient time to obtain adequate medical examinations; (10) the trial court erred with regard to sequestering the jury; (11) the trial court improperly considered Van Poyck's prior convictions; (12) the trial court erred in finding the existence of an aggravating circumstance which duplicated an essential element of felony murder; (13) Van Poyck was denied his right to effective assistance of counsel during the penalty phase of the trial; (14) the death sentence is not proportional under these facts; and (15) Florida's death penalty statute is unconstitutional. After fully considering these issues in light of the record in this cause, we find no error which requires a new sentencing proceeding.

We find no merit in Van Poyck's claims that he was a minor actor and did not have the culpable mental state to kill. In *DuBoise v. State*, 520 So.2d 260 (Fla.1988), we reiterated the established principle in Florida that the death penalty is appropriate even when the defendant is not the triggerman[5] and discussed proportionate punishment, stating:

> In *Tison* the Court stated that *Enmund* covered two types of cases that occur at opposite ends of the felony-murder spectrum,

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[5] *See, e.g., Copeland v. Wainwright*, 505 So.2d 425 (Fla.), *vacated on other grounds*, 484 U.S. 807, 108 S.Ct. 55, 98 L.Ed.2d 19 (1987); *Jackson v. State*, 502 So.2d 409 (Fla.1986), *cert. denied*, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987).

> i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted to kill, or intended to kill." The Tison brothers, however, presented "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." The Court recognized that the majority of American jurisdictions which provide for capital punishment "specifically authorize the death penalty in a felony-murder case where, though the defendant's mental state fell short of intent to kill, the defendant was the major actor in a felony in which he knew death was highly likely to occur," and that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.' " Commenting that focusing narrowly on the question of intent to kill is an unsatisfactory method of determining culpability, the Court held "that *major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement.*"

Id. at 265-66 (citations omitted, emphasis added) (quoting *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)). Although the record does not establish that Van Poyck was the

triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdez arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional.

We note that, although the pro-death jurors should have been excused for cause, the trial judge subsequently excused them for personal reasons. Consequently, Van Poyck was not required to exercise any peremptory challenges with regard to those jurors and that issue is moot.

We find that none of the other claims merit discussion. Further, we conclude that each of the aggravating circumstances found by the trial judge was properly established in this record and that the trial judge could properly conclude that the aggravating circumstances outweighed the mitigating evidence in this cause. Accordingly, we affirm each of Van Poyck's convictions and sentences.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, EHRLICH, BARKETT, GRIMES and KOGAN, JJ., concur.

564 So.2d 1066, 15 Fla. L. Weekly S379

APPENDIX D
SUPREME COURT OF FLORIDA

No. SC04-696

WILLIAM VAN POYCK,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[May 19, 2005]

PER CURIAM.

William Van Poyck appeals an order of the circuit court summarily denying a motion for postconviction DNA testing under Florida Rule of Criminal Procedure 3.853. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons that follow, we affirm the circuit court's denial of Van Poyck's motion for postconviction DNA testing.

FACTS AND PROCEDURAL HISTORY

The facts of Van Poyck's crimes were previously detailed by this Court on direct appeal as follows:

> The record establishes that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a state prison inmate, in a van from Glades Correctional Institute to a dermatologist's office for an examination. Griffis, who was not armed, drove the van while Turner watched O'Brien, who was secured in a caged area behind Griffis. After Griffis pulled the van into an alley behind the doctor's office, Turner looked down for his paperwork. Upon looking up, he saw a person, whom he later identified as Van Poyck, aiming a pistol at his head. Van Poyck ordered Turner to exit the van. At the same time, Frank Valdez, an accomplice of Van Poyck's, went to the driver's side of the van. Turner testified that Van Poyck took his gun, ordered him to get under the van, and kicked him while he was attempting to comply with Van Poyck's order. He testified that, while under the van, he saw Griffis exit the van; he noticed another person forcing Griffis to the back of the van; and, while noticing

two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground. Turner further stated that Van Poyck had stopped kicking him when the gunfire started, but noted that he did not know where Van Poyck was at the time of the shooting. Griffis was shot three times, once in the head and twice in the chest. Expert testimony indicated that the shot to the head was fired with the barrel of the gun placed against Griffis' head and that each of the wounds would have been fatal. It was also determined that the murder weapon was a Hungarian Interarms nine millimeter semiautomatic pistol.

After Griffis was shot, Turner was forced to get up from under the van and look for the keys. Upon realizing that Turner did not have them, Valdez fired numerous shots at a padlock on the van in an attempt to free O'Brien. One of the shots ricocheted off of the van and struck Turner, causing him minor injuries. Turner testified that at around this time Van Poyck aimed the Hungarian Interarms semiautomatic nine millimeter pistol at him and pulled the trigger....

....

> Van Poyck, testifying on his own behalf, denied that he shot Griffis and stated that, while kicking Turner, he heard the gunshots and saw Griffis fall to the ground. He did, however, acknowledge that he planned the operation and recruited Valdez to assist him in his plan. Additionally, he stated that they took three guns with them.

Van Poyck v. State, 564 So. 2d 1066, 1067-68 (Fla. 1990) (Van Poyck I). Van Poyck was convicted of first-degree murder, six counts of attempted manslaughter, armed robbery with a firearm, aiding in an attempted escape, and aggravated assault. See id. at 1068. Regarding the first-degree murder conviction, the jury found Van Poyck guilty of both first-degree premeditated murder and first-degree felony murder on a bifurcated verdict form, and recommended the death penalty by a vote of eleven to one. See id. The trial court followed the jury's recommendation and imposed the death penalty for the first-degree murder conviction. See id.

On direct appeal, we concluded that there was insufficient evidence to support Van Poyck's conviction for first-degree premeditated murder because the State's evidence was conflicting as to Van Poyck's location at the time of the murder. See id. at 1069. We concluded, however, that there was sufficient evidence to support the first-degree felony murder conviction. See id. We also held that the

death sentence was a proportional punishment because the record established that Van Poyck was a major participant in the felony murder and that he acted with reckless indifference to human life since he knew that lethal force could be used during the commission of the felony. See id. at 1070-71. Thus, we affirmed Van Poyck's convictions and sentences.

In his initial postconviction motion, Van Poyck raised numerous claims, including that counsel was ineffective during the guilt phase for failing to present additional direct evidence, such as DNA tests, regarding the identity of the triggerman. See Van Poyck v. State, 694 So. 2d 686, 696-97 (Fla. 1997) (Van Poyck II). We affirmed the circuit court's order denying relief on this claim. See id. at 697. Subsequently, this Court denied Van Poyck's petition for habeas corpus relief, rejecting arguments that (1) Van Poyck was wrongfully forced to exhaust his preemptory challenges, (2) appellate counsel was ineffective on direct appeal, and (3) Van Poyck was convicted of criminal offenses that did not exist as a matter of law. See Van Poyck v. Singletary, 715 So. 2d 930 (Fla. 1998); see also Van Poyck v. Singletary, 728 So. 2d 206 (Fla. 1998) (denying habeas corpus petition in unpublished order); Van Poyck v. Crosby, 860 So. 2d 980 (Fla. 2003) (denying habeas corpus petition in unpublished order), cert. denied, 541 U.S. 974 (2004). The United States Court of Appeals affirmed the denial of Van Poyck's petition for habeas corpus relief, concluding that (1) counsel was not ineffective during the penalty phase, (2) the trial court did not err in denying Van Poyck a continuance between the guilt and penalty phases, (3) counsel

was not ineffective during the appellate proceedings, and (4) Van Poyck's sentence was not based on an invalid aggravating factor. See Van Poyck v. Fla. Dep't of Corrections, 290 F.3d 1318 (11th Cir. 2002) (Van Poyck III).

Thereafter, Van Poyck filed a motion pursuant to Florida Rule of Criminal Procedure 3.853 seeking DNA testing of all of the clothing worn by Van Poyck and Valdez at the time the murder occurred. Van Poyck alleged that the DNA testing could establish that Valdez and not Van Poyck was the triggerman. Van Poyck further alleged that this evidence would mitigate his death sentence because the sentence was based on the mistaken belief that Van Poyck was the triggerman. In the alternative, Van Poyck asserted that he was entitled to an evidentiary hearing on the issue. The State opposed the motion, asserting that there is no reasonable probability that the identity of the triggerman would mitigate Van Poyck's sentence. The trial court summarily denied Van Poyck's motion seeking DNA testing, finding that "pursuant to exhibits contained in the court file which are incorporated herein as reference that there is no reasonable possibility that any DNA testing will result in exoneration or in a mitigated sentence." Van Poyck appeals the trial court's order summarily denying his rule 3.853 motion.

ANALYSIS

Rule 3.853 sets forth the procedures for obtaining DNA testing under section 925.11, Florida Statutes (2004). The rule provides that a petition for

postconviction DNA testing must include, among other things, "a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime." Fla. R. Crim. P. 3.853(b)(3). The burden is on the movant to "demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case." Hitchcock v. State, 866 So. 2d 23, 27 (Fla. 2004). Rule 3.853 requires the court to make the following findings when ruling on a motion seeking postconviction DNA testing:

> (A) Whether it has been shown that physical evidence that may contain DNA still exists.
>
> (B) Whether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.
>
> (C) Whether there is reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

Fla. R. Crim. P. 3.853(c)(5) (emphasis supplied).

In this case, the pleading requirements of rule 3.853 have been satisfied. The issue before the Court is whether DNA evidence establishing that Van Poyck was not the triggerman creates a reasonable probability that Van Poyck would have received a lesser sentence.[6]

During the penalty phase, the State argued in closing that the evidence supported a finding that Van Poyck was the triggerman, but even if the jurors were to find otherwise, they could still recommend the death penalty if they concluded that Van Poyck played a major role in the felony murder and that he acted with reckless indifference to human life. Therefore, the State's theory that the death penalty was appropriate was not based primarily on Van Poyck's triggerman status. Similarly, the trial court did not rely on Van Poyck's triggerman status in imposing the death penalty. The trial court found that the death penalty was an appropriate sentence because the mitigating evidence[7] presented was

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[6] Although not controlling on the issue before the Court, we note that prior to trial, defense counsel moved for a continuance in order to allow the defense to have the clothing worn by Van Poyck and Valdez testing using DNA testing procedures. Despite the fact that the trial court granted the continuance so that DNA testing could be conducted, the clothing was never tested.

[7] During the penalty phase, defense counsel presented four witnesses in mitigation who testified that (1) Van Poyck's father was frequently away from home and that his mother had passed away when Van Poyck was young; (2) for a period of

insufficient to outweigh the aggravating circumstances.[8] See Van Poyck I, 564 So. 2d at 1068-69. None of the aggravating circumstances found by the trial court were based on Van Poyck's triggerman status.

In fact, the only indication that the trial court even considered Van Poyck's triggerman status is a passage in the trial court's order in which the court stated that the "State clearly presented competent and substantial evidence as to the crime of first degree felony murder and or first degree premeditated murder and in reality presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis." (Emphasis supplied.) This statement demonstrates only that the trial court was uncertain whether Van Poyck shot and killed Officer Griffis, rather than a conclusion that Van Poyck was

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time Van Poyck lived with a housekeeper who appeared to be strange and unstable; (3) Van Poyck's siblings had juvenile records; (4) Van Poyck was remorseful for his actions; and (5) Van Poyck was helpful to other prison inmates. See Van Poyck I, 564 So. 2d at 1068. Van Poyck also testified during the penalty phase, accepting responsibility for the fact that Officer Griffis was killed and expressing remorse for his actions. See id.

[8] The trial court found the following four aggravating circumstances: (1) that the crime was committed while Van Poyck was under a sentence of imprisonment; (2) that the crime was committed for the purpose of effecting an escape from custody; (3) that Van Poyck knowingly created a great risk of death to many persons; and (4) that Van Poyck was previously convicted of another felony involving the use or threat of violence. See Van Poyck I, 564 at 1068.

the triggerman. Despite this uncertainty, the trial court found that "[b]y all evidence Mr. Van Poyck was a major participant" in the felony murder.

The United States Court of Appeals' analysis of Van Poyck's petition for habeas corpus relief is also instructive. In reviewing Van Poyck's ineffective assistance of counsel claim, the circuit court addressed whether there was a reasonable probability that evidence establishing that Van Poyck was not the triggerman would have affected the trial court's imposition of the death penalty. See Van Poyck III, 290 F.3d at 1325-26. The circuit court concluded that upon considering the trial court's uncertainty whether Van Poyck was the triggerman and the prosecutor's closing arguments during the penalty phase, there was "no reasonable probability that, if Counsel had presented the additional evidence that [Van Poyck] was not the triggerman, the outcome of the sentencing phase would have been different." Id. at 1326.

Further, this Court did not rely on Van Poyck's triggerman status in affirming his death sentence on direct appeal. This Court stated that "[a]lthough the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime." Van Poyck I, 564 So. 2d at 1070. The Court concluded that the death sentence was a proportional punishment "[s]ince there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used." Id. at 1070-71. In reaching this conclusion, we

observed that the death penalty is appropriate even when the defendant is not the triggerman if the defendant is a major participant in the felony and acted with reckless indifference to human life. See id. at 1070. Evidence establishing that Van Poyck was not the triggerman would not change the fact that he played a major role in the felony murder and that he acted with reckless indifference to human life.

For the foregoing reasons, we hold that there is no reasonable probability that Van Poyck would have received a lesser sentence had DNA evidence establishing that he was not the triggerman been presented at trial. We do not hold, as Justice Anstead asserts, that it makes no difference in the capital sentencing process which of two codefendants actually committed the killing. Rather, we determine only that under the circumstances of this case involving a murder of a prison guard in a brutal armed attack planned by Van Poyck and carried out with Valdez, DNA evidence indicating that Van Poyck was not the triggerman would not have created a reasonable probability of a lesser sentence, which is the standard for order DNA testing under Rule 3.853(c)(5)(C). Accordingly, we affirm the circuit court's order summarily denying Van Poyck's motion for postconviction DNA testing.

It is so ordered.

PARIENTE, C.J., and WELLS, LEWIS, QUINCE, CANTERO, and BELL, JJ.,
concur.

ANSTEAD, J., dissents with an opinion.
ANSTEAD, J., dissenting.

Today's ruling tell us that for purposes of assessing culpability between codefendants, it makes no difference who the actual triggerman was. I cannot accept that proposition generally, or as it is applied in this case. I respectfully dissent from the majority's determination that the proper identification of the triggerman in a homicide by shooting could have no bearing on the proper penalty to be imposed.

Common sense and our death penalty jurisprudence tell us that there is a vast difference in the importance of the defendant being the triggerman in a shooting death for purposes of evaluating the defendant's guilt (where it is not essential), compared with an assessment of a defendant's culpability for purposes of evaluating whether he should receive the death penalty.[9] For example, in our initial review in this case, this Court found that the evidence was insufficient to prove that

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[9] While there are numerous decisions from this Court standing for the proposition that the identity of the triggerman is critical in an assessment of the appropriate penalty, none illustrates the point better than Justice Grimes' separate opinion in Zerquera v. State, 549 So. 2d 189, 193 (Fla. 1989), where he expressed disagreement with the majority's remand for a new trial on guilt, while agreeing that a new penalty phase was necessary "[b]ecause the question of who did the actual shooting directly bears on whether Zerquera should receive the death penalty." 549 So. 2d at 193 (Grimes, J., concurring in part, dissenting in part).

the defendant was the triggerman and guilty of premeditated murder, but the evidence was nevertheless sufficient to sustain a conviction for felony-murder. Van Poyck v. State, 564 So. 2d 1066, 1069 (Fla. 1990).

We need only examine the trial record in this case to see explicit proof that the identity of the triggerman was both important and at issue in the jury's assessment of the appropriate penalty for Van Poyck. In this case, the prosecutor expressly argued to the jury during the penalty phase: "So again, it is important who the triggerman is. There is no doubt about it. It's important to your deliberations, okay." Subsequent to those statements the prosecutor told the jury: "So ladies and gentlemen, even though he says he was not the triggerman, I submit the evidence shows that he was, because the only eyewitness we have that actually saw the guns well enough to identify is Officer Turner. He is the one left alive here to tell you who had what gun."[10] Thus, there can be no doubt that the prosecution, in seeking the death penalty, asserted to the jury first, that it was important in their deliberations on the penalty to determine who the triggerman was, and,

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[10] In addition, the trial court stated in its sentencing order:

> The Court further finds that the State clearly presented competent and substantial evidence as to the crime of first degree felony murder and or first degree pre-meditated murder and in realty presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.

second, in this case, the evidence supported a determination that the defendant was the triggerman. The jury, of course, after this argument, returned with a recommendation for death.[11]

On the face of this record how can we possibly now conclude that the identification of the triggerman is irrelevant to the determination of whether the death penalty should be imposed? The prosecutor has already answered that question for us. The majority has chosen to deal with a hypothetical situation: could the death penalty be imposed on a non-triggerman, rather than dealing with the actual situation presented here where the State sought the death penalty, asserting as grounds that the defendant was the triggerman, and the jury returned with a vote for the death penalty.

Not much is being asked in this case, only that some evidence be re-examined to allow modern science and technology to inform us as to whether we can be more informed about who actually did the killing. The Legislature has authorized exploration of this new evidence if it could have an impact on the assessment of the penalty to be imposed for the crime. Surely, if it was available, the judge, the jury and this Court would all have wanted to consider this evidence at the time this case was tried so we could have greater confidence in our decision-making as to the defendant's culpability and our decision for life or death.

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[11] This, of course, is the same jury that we determined was in error in finding the defendant guilty of premeditated murder.

An Appeal from the Circuit Court in and for Palm Beach County,

Richard I. Wennet, Judge - Case Nos. 87CF006736 A02 and 88CF011116 A02

Mark E. Olive, Tallahassee, Florida and Jeffrey O. Davis of Quarles and Brady, LLP, Milwaukee, Wisconsin,

for Appellant

Charles J. Crist, Jr., Attorney General, Tallahassee, Florida, And Celia A. Terenzio, Assistant Attorney General, West Palm Beach, Florida,

for Appellee

APPENDIX E
SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,
Appellant,

v. No. 84324

STATE OF FLORIDA,
Appellee.

[March 27, 1997]
Rehearing Denied May 27, 1997

PER CURIAM:

William Van Poyck appeals an order entered pursuant to Florida Rule of Criminal Procedure 3.850, in which the trial court denied all relief. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed, we affirm the denial of Van Poyck's motion for post conviction relief.

Facts

The facts of this case are detailed in our decision, reported in *Van Poyck v. State,* 564 So.2d 1066 (Fla.1990), affirming Van Poyck's convictions and sentences. In summary, the relevant events unfolded as follows. On June 24, 1987, state inmate James O'Brien was transported to the office of a dermatologist by two corrections officers. Officer Griffis drove the van and was unarmed. Officer

Turner was responsible for watching O'Brien, the two separated by a cage. Upon arriving at the dermatologist's office, Officer Turner turned his eyes downward looking for paperwork. When Turner looked back up, he saw Van Poyck, who had approached the van, aiming a gun at his head. Officer Turner was forced out of the van and ordered to crawl underneath the vehicle. While Officer Turner was getting under the van, Frank Valdez, one of Van Poyck's accomplices, was approaching the driver's side of the van. Officer Turner, from underneath the van, saw Officer Griffis forced out of the van and taken to the back of the vehicle. Then, while noticing two sets of feet near the back of the van, he heard the gunshots that killed Officer Griffis. Officer Turner did say, however, that he was unable to testify as to Van Poyck's location when the shooting occurred. Officer Griffis was shot three times, once with the barrel of the gun placed to his head.

Van Poyck was tried and convicted for first-degree murder, attempted first- degree murder, aiding in an attempted escape, aggravated assault, and six counts of attempted manslaughter. By a vote of eleven to one, the jury recommended that the penalty of death be imposed. The trial judge followed the jury's recommendation and sentenced Van Poyck to death. On direct appeal, Van Poyck raised six guilt-phase issues and fifteen penalty-phase issues. This Court, in our initial opinion, found the evidence could not sustain the conviction of premeditated murder but upheld the first-degree murder conviction on the theory of felony murder.

After that pronouncement, we rejected or found harmless all other claims and affirmed Van Poyck's convictions and sentences.

Van Poyck then filed a motion to vacate his convictions and death sentence, pursuant to rule 3.850, on December 8, 1992. A substantial evidentiary hearing was held on multiple issues after which the lower court denied all relief.

In his appeal of that order, Van Poyck raises sixteen claims. We find that none warrant relief. Accordingly, we affirm the lower court's order.

Ineffective Assistance of Penalty-Phase Counsel

Van Poyck's first two claims center around the representation he received at the penalty-phase proceeding. He argues that his counsel was ineffective. We disagree. Further, he asserts that the lower court inappropriately limited his ability to prove the ineffective nature of his penalty-phase representation by refusing to reopen the evidentiary hearing or to supplement the record when an affidavit became available after the close of the proceedings. We also find no merit in this assertion.

Van Poyck's claim of ineffective penalty-phase representation is based on the allegation that his trial counsel, Cary Klein, failed to adequately investigate mitigating evidence of Van Poyck's problematic life and mental- health histories. The two-prong standard for evaluating an ineffective assistance of counsel claim, set forth in *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), requires: (1) that the defendant first demonstrate deficient performance by counsel; and (2) that the defendant then demonstrate that such deficient performance caused prejudice. Based on the record in this case, Van Poyck has not demonstrated deficient performance by his counsel.

At the outset, it must be understood that Van Poyck argues two distinct areas of deficiency. He argues that Klein should have investigated, discovered, and presented both his life history and his mental-health history. As to his claim regarding deficient investigation and presentation of mental-health evidence, we find that Klein had clear tactical reasons for avoiding such a line of argument. The following testimony from Klein at the evidentiary hearing below illuminates Klein's tactical considerations:

Q: [By prosecutor Geesey]:

During the course of your representation of this defendant, you've indicated that you obtained his jail records. Were you referring to Department of Corrections records?

A: Yes.

Q: When did you obtain those records and—

A: I don't recall exactly the date. It was fairly early on in the representation. I would say sometime by late fall we had gotten his DOC records or sometime by the winter.

Q: Why did you want his DOC records?

A: We sent away for his Department of Correction records because he had spent the last 15 or so years in the Department of Corrections. From the time he was 17 or so until maybe 6 months before the crime happened, that's where all of his time was spent. The Department of Corrections also had all of his mental health records from the time he was in DOC so we would need those, also.

One of the things we were looking for, and this was a suggestion of Mr. Van Poyck's, if he had a decent prison record or there were some people willing to testify that he could be a model prisoner, that might be a mitigating circumstance, a jury believing that he could be a model prisoner in the prison system might be willing to let him spend the rest of his life in the prison system so we sent away for those prison records.
The prison records also had his prior crimes, prior convictions, some of the judgments in them. It would have a lot of things we would need to help us prepare primarily for phase two but even, to some degree, for phase one. If

we decided to have him testify, we'd need to know what convictions he had. That would be in Department of Corrections records.

Q: Obviously well may have.

Have you reviewed your time sheets and your billing from back in '87 and '88 recently?

A: No, I haven't, not since I submitted the bill on the case which was probably 4 to 6 months after the trial was over.

Q: Did you have any recollection of approximately how many hours you spent reviewing those DOC records?

A: I could only estimate. It had to take at least 10 hours. It took the better part of two complete days to get through most of the records and that's even with skimming some of them.

Q: And in those records, you were looking for what type of evidence, specifically?

A: *I was looking for, specifically, mental health records. I wanted to see what happened in the mid '70's, why he was—why he was sent to Chattahootchee, what the diagnosis was, the prognosis, why he came back.*

I was looking also, very specifically, for whether I could get anything out of his prison

records that would be mitigating in terms of him being a model prisoner, a good prisoner. Specifically, that is really the two specific things we were looking for.

Q: First of all, did you find anything in those records that would give you evidence that he was a model prisoner and that you could perhaps use as a non statutory mitigating circumstance?

A: No, I didn't find anything that was really helpful in that regard.

Q: And, in fact, was it fairly—how would you describe the number of disciplinary reports and the type of offenses he committed for those?

A: Well, he had several D.R.'s. He had quite a number of them. Obviously, he had done a lot of fighting in prison.

Q: Were there any weapon offenses for the D.R.'s?

A: I think there were one or two weapon offenses. He had had some escapes, also.

Q: Did you see anything in those records that you could use to establish a nonstatutory mitigating circumstance?

A: At one point I thought that I could take at least the 5 years of his prison record and use some of that because it got progressively better as he was there. The first 10 years or so he was in prison, it was horrible. As I guess he learned how to play the system, it got better but even in the last 5 years, I think he got one or two D.R.'s. I didn't think we could use any of that without having the previous 10 years come in from the State to make it look even worse than it was.

Q: You felt that it couldn't be done without opening the door?

A: Right.

....

Q: From your review of those records, did you believe that there was anything in there that would be of assistance in a penalty phase?

A: I thought the fact that he had been in Chattahootchee and the previous mental health encounters would be of some mitigating or might be of some mitigating use in phase two.

Q: At some point in time was there a decision made not to use that evidence?

A: Yes.

Q: When was that decision made?

A: Well, initially, the decision was made. Although it wasn't hard and fast, I was inclined not to use them. When I spoke to Mr. Van Poyck he explained to me that he had faked some of the brief mental illness. He faked the light bulb incident and we had a good laugh over that. And I probably would have used it, notwithstanding, if I had gotten some help later on from some mental health experts that perhaps he was, notwithstanding what he told me, he was still mentally ill.

Q: When did the defendant tell you that he had faked some of his mental health history and faked the incident with the light bulb?

A: Well, I'm trying to remember the first time it came up. I think the first time it came up I'm not sure Mike [co-counsel Dubiner] was even appointed. Actually, I think he was appointed, which meant it was probably the summer of '88. It was probably either late spring or summer of '88.

After Mike Dubiner was appointed, we had a conversation in the jail. He had told me that he denied that he was really sick in the '70's and he told me he had like made it all up to get out of the prison population to go to Chattahoochee.

Q: When the defendant told you this, did you question in your own mind whether or not he was being truthful with you?

A: Initially, no, I don't think I really questioned it. I think I accepted what he was telling me. He went into detail. I mean, he wasn't delusional, at the time. He had a pretty good recall of most of the facts and fairly decent sense of humor about the incident. He understood the circumstances, at the present time. What I did have is doubts, not about his truthfulness but I had doubts about why he was telling me that.

Q: Were you concerned about that?

A: Yes, I was pretty—

Q: *Let's go specifically into what the defendant told you in the summer of '88 about his faking. First of all, did the defendant say anything about any preparation before he began faking this mental illness?*

A: *He told me that he had gone to the prison library and looked up some books on schizophrenia and mental illness, had done extensive reading on it in preparation for this charade.*

Q: How long did he tell you that he had spent preparing and reading and studying for all of this?
A: He didn't tell me how long. I don't recall if he told me specifically how long but I got the impression he was fairly well—if he was

telling me the truth, that he had prepared pretty well for it because he fooled the doctors, obviously, at Chattahoochee at Florida State Hospital.

Q: Did the defendant say how he was able to obtain these materials, read and study these materials? Did that seem consistent with his cognitive ability that he demonstrated to you in his legal research?

A: It did. It was probably one of the reasons I probably believed him without much doubt, yes.

Q: *And what did he say, specifically, about how he faked the mental history?*

A: *I think he explained to me how he made it appear that he was chewing on this light bulb.*

Q: *What did the defendant say about that?*

A: *I think he said he put something in his mouth that made a crunch or something like that and they were convinced he was eating a light bulb.*

Q: *Did he have light bulb parts?*

A: *Yes, he was like spitting out the little metal pieces. He didn't go into great detail about it but it was enough to convince me that he had pulled a little sleight of hand on them.*

....

Q. Did you want to open the door to any evidence of the defendant's escape or attempted escape while incarcerated on other charges earlier in his life?
A. No.

Q. Did you think that would have a detrimental effect in seeking a life recommendation from the jury?

A. Clearly that would've had a detrimental effect. We did not want the jury to know this was not a person who could be trusted for life in prison.

Q. Earlier on defense counsel showed you State's Exhibit Number 2 and that it was a report of the defendant in 1977 stating that he had expected to end up on death row someday and he would not hesitate to destroy a snake in a brown shirt. Is that information that you would have wanted to come in front of a jury in a penalty phase?

A. No, I don't think so.

Q. Would you want to do anything to call attention to that document on the part of the prosecutor?

A. No.

Q. Also, in cross examination, the defense counsel asked you about the five years aggravation in the defendant's parole in 1980 because of his mental health history. That took place in 1980; correct?

A. Yes, and it was litigated for a number of years thereafter.

Q. After that occurred in 1980, was there any additional evidence of mental disturbance on the part of the defendant?

A. No.

Q. He was cured from that point on?

A. As far as I know he was mentally healthy for the remainder of the 80's.

Q. Concerning the issue of voluntary intoxication, was that successful for the codefendant?

A. No.

Q. Did you think it was a viable defense for your client?

A. No.

(Emphasis added.) This extended excerpt demonstrates that Klein had quite adequate reasons for limiting his use of the prison records and thereby

limiting the presentation of Van Poyck's mental-health history. Further, Klein testified that Dr. Villalobos, after examining Van Poyck prior to the penalty phase, reported that Van Poyck was a sociopath. Indeed, Klein testified that Dr. Villalobos asked not to be called as a witness because his findings would not be helpful. This information only strengthens Klein's tactical choice. While we acknowledge that Klein's co-counsel Dubiner testified that they were unprepared for the penalty-phase proceeding and, in his opinion, should have spent more time preparing mental-health evidence for presentation, we will not second-guess Klein's clearly tactical choice. *See Cherry v. State,* 659 So.2d 1069, 1073 (Fla.1995)(concluding that present counsel's disagreements as to strategy does not necessarily satisfy *Strickland* because standard is not how present counsel would have, in hindsight, proceeded).

As to Klein's choices regarding the presentation of Van Poyck's life history during the penalty-phase proceeding, we likewise find no error. Evidence of Van Poyck's life history was adequately presented by Klein at the penalty-phase proceeding.[12] Indeed, the jury was actually aware of most aspects of Van Poyck's life that he now argues

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[12] It must be noted that Van Poyck blurs the line between his life history and his mental-health history in this portion of his brief. To the extent that he reargues that Klein was deficient for failing to adequately investigate and present Van Poyck's mental-health history, we ignore such argument as it has been resolved above.

should have been presented. Klein testified to the following in the evidentiary hearing below:

> Q: Did you ask the defendant any questions to try and find out what you could do in a penalty phase?
>
> A: We discussed it constantly, constantly. He was very up on it.
>
> Q: What kind of questions?
>
> A: I asked him who I could contact, who I could call, who were your friends when you were kids? I didn't have any. Tell me about your family. Well, the only one still in contact is my stepmother and my brother, so on and so forth. I don't mean to tell you that he was directing what to do but he had a tremendous input, being intelligent and knowing the mitigating circumstances, both statutory and nonstatutory. We considered like a list of 18—I think it was 15, 16, 18 nonstatutory mitigating circumstances.
>
> In fact, I put them up in closing argument in phase two. I must have listed 12 or 13 nonstatutory [circumstances] that we could not actually prove other than the couple that we tried to prove that I suspected were there but none could we show.
>
> Q: Did you ask the defendant if he had ever been raped?

A: We talked about that. He told me that he had not. He didn't have that many problems in jail; that he was able to take care of himself and they generally left him alone.

At the penalty-phase proceeding, defense testimony was presented by Deborah Chisholm, Jeffrey Van Poyck, Anne Van Poyck, Lee Van Poyck, and by Van Poyck himself. Chisholm was a nurse at the Palm Beach County Jail when she met Van Poyck. She testified that Van Poyck was a "very caring person, very friendly, very loving and very intelligent and somebody that I really enjoyed talking to." Further, she testified that Van Poyck had indicated to her that he did not kill Griffis and that he was sorry that the shooting had happened.

Jeffrey Van Poyck is Van Poyck's brother. Klein testified that he made the tactical decision to call Jeffrey Van Poyck for the following reason:

One of the reasons why I called Jeff, I wanted Jeff to testify before the jury because I wanted these people to see that this was his only role model from the time he was a little baby. Jeff, who was his brother, I think was serving, at the time, I think a 40 year prison sentence for armed robbery.

You had to be there to listen to this guy's testimony. I think he was the most cold and chilling witness I had ever seen on the witness stand. As it turned out, I think the jury hated this guy, couldn't stand him. But I felt like we

had to call him because if I had tried to explain to [the] jury what kind of role model or influence he was, they wouldn't have believed me. I thought they had to see Jeff for themselves to understand how chilling, cold an influence this person would've had on Bill. But again, we had no psychological underpinning for it.

Jeffrey Van Poyck testified to the facts surrounding his mother's death. The defendant was very young when his mother passed away. Jeffrey Van Poyck then testified that his father hired Ms. Dano to take care of both the house and the children (Jeffrey, William, and Lisa). She was a strict disciplinarian. Indeed, she beat the three children until their father fired her at gunpoint. At that point, Jeffrey Van Poyck testified, Aunt Phyllis moved into the house and cared for the three children. She remained as caretaker until the elder Van Poyck (their father) married Lee Hightower. Finally, Jeffrey Van Poyck extensively testified to his life in crime (500 burglaries, he claimed, prior to his first arrest) and the influence such an example could have had on the defendant.

Anne Van Poyck was the defendant's aunt. She gave insight into Aunt Phyllis. First, she testified that Phyllis may not have been the woman's real name. Second, she testified that the children's natural mother was named Phyllis. Third, she revealed that Aunt Phyllis told the children that she was their real mother. Finally, her testimony was that she was not impressed with Aunt Phyllis' ability

as a surrogate mother and that she considered Aunt Phyllis to be a[illegible]nstable person.

Lee Hightower Van Poyck is the defendant's stepmother. Her testimony provided insight into the personality of the defendant's father, Walter Van Poyck. She stated:

> Well, first of all, he was a very good man. He was a very kind man, a very caring man.
>
> As you probably know, he was disabled. He lost his leg in World War II in the Holland invasion.
>
> Consequently, he was not with the children as active as an ordinary father would be. He was unable to do certain things with the children, but he was a good father.
>
> ....
>
> Let me say this: Walt Van Poyck loved his family. He has difficulty demonstrating that love. He was not demonstrative but he was kind and he was gentle and he was caring, but he wasn't outgoing with his affection.

Lee Hightower Van Poyck also verified that Aunt Phyllis had grown up being called Amy but changed her name to Phyllis at some point. She also thought that Aunt Phyllis was unstable. Finally, she opined that Jeffrey Van Poyck had been a bad influence on the defendant.

Notably, defendant Van Poyck then testified to the following:

> Q. Mr. Van Poyck, you heard your mother testify today and you heard your brother testify about some remorse that you showed in writing some letters. *If you would forget for a second whatever letters you may have written, Mr. Van Poyck, how do you feel about the—about your actions regarding the incident of June 24, 1987?*
>
> A. *Well, I take responsibility for the fact that—if I had not made a decision to free James O'Brien, Mr. Griffis would still be alive.*
>
> Q. *Mr. Van Poyck, you heard testimony about your brother, Jeffrey, and his influence on you. You heard Jeffrey testify. Is it Jeffrey's fault that you are the way you are today?*
>
> A. *I can't say that, no, sir.*
>
> Q. *Why not?*
>
> A. *I happen to believe that people should be responsible for their own actions.*
>
> Q. Do you consider yourself a fairly intelligent person?
>
> A. I would hope so.

(Emphasis added.) Clearly, Klein did an adequate job of presenting Van Poyck's life history. In sum, we conclude that Klein's performance was not deficient in presenting Van Poyck's mental-health and life histories. Indeed, Klein tactically avoided presenting (or opening the door to the presentation of) events severely disadvantageous to Van Poyck's cause. Accordingly, we find no merit to the claim that Van Poyck received ineffective assistance of counsel at the penalty phase of his trial.[13]

Van Poyck's second argument relating to his penalty-phase representation is that the court below erred in refusing to allow him to either supplement the record or to reopen the evidentiary hearing on the post- conviction motion. The purpose of such reopening or supplementation would be to secure the affidavit or testimony of Dr. Villalobos in relation to his conversations with Klein. Dr. Villalobos presumably denies making certain statements to Klein. As noted earlier, Klein testified that Dr. Villalobos told him that Van Poyck was a sociopath. Indeed, the lower court cited this fact to bolster its conclusion that Klein's decisions were part of a

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[13] We note that Van Poyck raised this same claim in his direct appeal. At that time we disposed of the issue by stating that "[a]fter fully considering these issues in light of the record in this cause, we find no error which requires a new sentencing proceeding." *Van Poyck v. State,* 564 So.2d 1066, 1070 (Fla.1990). The State, however, argued in its direct-appeal brief that "[a]ppellee contends that the issue is improperly before this Court on direct appeal." As is proper, the State does not argue that the claim is procedurally barred in this collateral action. We choose to address this claim on its merits. For the reasons explained, though, we find that it has no merit.

tactical plan. It now seems that Dr. Villalobos, if allowed, would deny making such a statement.

In evaluating the impact of the judge's action, we must look at the type of claim Van Poyck raises. The trial judge's denial of Van Poyck's motion to reopen or to supplement is only harmful to him if the refused material would be determinative of a valid claim. In this case, Van Poyck is trying to use Dr. Villalobos' testimony or affidavit to prove ineffective assistance of penalty- phase counsel. If such ineffective assistance of counsel could not be proven even with the additional testimony or affidavit, any error in refusing to reopen or supplement would be harmless.

We have already stated that the record, as currently comprised, demonstrates no penalty-phase deficiency by Klein. Would the testimony or affidavit of Dr. Villalobos change that? Two large assumptions would have to be made in order to contemplate such a change. First, it would have to be assumed that Dr. Villalobos' testimony or affidavit would be given more credibility and weight than Klein's testimony. Second, it would have to be assumed that Klein's tactical decision as to mental-health evidence is crippled if he truly received no information from Dr. Villalobos (as the doctor claims) instead of negative information (as Klein claims). It is not at all clear that either of these assumptions is valid. In the first instance, Klein's testimony is quite convincing. Indeed, there is scant evidence that Klein's testimony even came as a surprise to Van Poyck. In the second instance, it must be

remembered that Klein testified that he was inclined to refrain from presenting mental- health evidence as mitigation unless a mental-health expert could actually say Van Poyck was mentally ill. Dr. Villalobos was not, by any account, prepared to make that statement. In fact, the affidavit signed by Dr. Villalobos (at issue in this particular motion) made no such affirmative claim. The affidavit reflects only that Dr. Villalobos had insufficient time to make any evaluation. Van Poyck attributes the insufficiency of examination time to Klein's deficient preparation. Even if Dr. Villalobos told Klein that he had insufficient time to offer any opinion, it is by no means certain that Klein would have been deficient for making the tactical decision to refrain from presenting (thereby halting his search for a mental-health expert) mental- health mitigation. As we have already demonstrated, Van Poyck's prison records were full of unsavory information that Klein has testified he wanted to keep from the jury. With this said, though, we will grant, arguendo, that both assumptions outlined above are valid and that Dr. Villalobos' affidavit or testimony would prove Klein's penalty-phase performance deficient. In such an event, Van Poyck still has to demonstrate that he was prejudiced. He cannot do so because this record will not support such a conclusion.

Any mental-health evidence that might have been produced would have been severely undermined by the contents of Van Poyck's prison records. Those records included extensive documentation as to examinations and conclusions by prison doctors. On September 26, 1975, Van Poyck was presented to the

Forensic Unit Staff Conference. The conference was attended by doctors Ogburn, Dachtera, and Mehta. Their final diagnosis was that Van Poyck suffered from "Personality Disorder, Antisocial Type with Paranoid Features." Then, on November 20, 1975, Dr. Margarita Gonzalez examined Van Poyck. She diagnosed Van Poyck with: (1) personality disorder, antisocial type with paranoid features; and (2) drug abuse, multiple. On February 26, 1976, Dr. Delfina Johnson examined Van Poyck and found no psychosis at the time. Once again, on May 27, 1983, Dr. Sotomayor evaluated Van Poyck and concluded that he did not "reveal any signs of psychosis." In fact, Van Poyck told Dr. Sotomayor that "[a]'int nothing wrong with me now. Am working and trying hard to behave myself." The following year, on June 6, 1984, another report was filed which found that "[s]ince Van Poyck exhibits an absence of any acute distress or mental disorder, treatment is not indicated and none is recommended." The prison records clearly contain an abundance of medical evidence indicating that Van Poyck's mental condition, if any, would not be mitigating in nature. Any testimony developed by the defense through mental- health experts would certainly be tempered by its inconsistency with the medical reports in the prison records. The records also contain the following information that would certainly be damaging to Van Poyck.

Over twenty prison disciplinary reports were filed against Van Poyck. Further, he had an attempted escape in his records. On that point, Klein specifically testified that he wanted to keep

such information from the jury because of the negative impact it would have on seeking a life recommendation. The records also reflect that in March of 1977, Van Poyck was placed in administrative confinement after getting caught typing a letter to another inmate. In that letter he stated, "I know for a fact that I am going to end up on death row within a couple of years." He also stated, "I would not hesitate to destroy any snake in a brown uniform." It must also be remembered that Van Poyck admitted to Klein that he faked the light bulb incident. If Klein had proceeded to use the incident as mitigating in nature, he would have been faced with an ethical problem. He would have encountered a situation in which his duty of candor towards the court required the revelation of Van Poyck's admission. The problematic nature of such a predicament is obvious.

Even as we assume, arguendo, that Klein should have allowed more time for mental-health evaluations of Van Poyck by experts, it cannot be denied that the force of the above information would probably dwarf any expert testimony Klein might have secured. In the context of this case, there is no possibility that Van Poyck could demonstrate that "but for counsel's errors he would have probably received a life sentence." *Hildwin v. Dugger,* 654 So.2d 107, 109 (Fla.1995). In reaching this conclusion, we have taken into account the testimony offered by Dr. Robert T.M. Phillips. Dr. Phillips specifically opined that Van Poyck

> is an individual who has suffered from what we would describe as a psychoactive substance abuse, organic mental disorder, which is a long winded, perhaps unnecessary saying, this is someone who has suffered from the ravages of alcohol and drug dependency and at the height of their dependency is most dysfunctional.

Dr. Phillips also opined that Van Poyck suffered from a schizo- affective disorder, a disorder described as being "not quite schizophrenia." We restate that, when considered in the context of the entire record, an isolated advantageous evaluation cannot be considered determinative.

In light of our finding that Van Poyck cannot demonstrate prejudice, the supplementation of the record or the reopening of the evidentiary hearing would not have led to a finding of ineffective assistance of penalty-phase counsel. An error, if any, in refusing to reopen or to supplement is consequently harmless beyond a reasonable doubt.

Ineffective Assistance of Guilt-Phase Counsel

We next address Van Poyck's claim that he was denied effective assistance of counsel at the guilt phase of his trial. Specifically, Van Poyck claims that his guilt-phase representation was ineffective in the following ten ways: (1) by failing to demonstrate that Van Poyck was not the triggerman; (2) by failing to impeach the testimony of Officer Turner; (3) by failing to present a voluntary intoxication defense;

(4) by failing to pursue a motion to change venue; (5) by failing to adequately conduct voir dire; (6) by conceding the underlying felonies of robbery and escape; (7) by failing to preserve a *Batson*[14] violation; (8) by allowing a shift in the burden of proof; (9) by allowing Van Poyck to take a large role in trial preparations; and (10) by failing to object to prejudicial statements by the prosecutor. More generally, Van Poyck also complains that the court below erred in summarily denying certain claims, thereby denying him a full and fair hearing. We disagree. We affirm the trial court's denial of all relief on this issue. Prior to addressing any of the individual areas of concern as to guilt-phase representation, however, we point out the following insightful testimony offered by Van Poyck's trial co-counsel (Michael Dubiner, now a key Van Poyck witness) at the evidentiary hearing below:

> Q: You testified on direct that this was a loser in guilt phase. Is that still your opinion today?
>
> A [Dubiner]: No question about it.
>
> ....
>
> Q: There were numerous witnesses who identified the defendant as being involved in the escape attempt, isn't that correct?
>
> A: Yes.

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[14] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Q: The murder weapon was found in the vehicle where the defendant was eventually arrested with Valdes, correct?

A: That's correct.

Q: Officer Turner's weapon that was taken from him during the commission of this crime was found in that motor vehicle, correct?

A: That's correct.

Q: There's never an identity issue as to whether the defendant was involved in that escape attempt, identity was never in issue?

A: No.

Q: Would anything have changed the outcome of that guilt phase?
A: No. I think that the strong likelihood is that any defense that was presented in Phase I would have led to a first-degree murder conviction.

Surely this testimony from a defense witness militates towards a finding that Van Poyck could not have suffered prejudice under the second prong of *Strickland*. Dubiner's testimony is reinforced by the statements, on cross- examination, of another defense witness (at the evidentiary hearing below), Carey Haughwout. She stated:

Q: My question is very specifically to the guilt phase of that trial, is there a viable defense?

A: No, I don't believe that there is a defense that would have resulted in an acquittal, no.

Q: There is no voluntary intoxication defense?

A: Not that would have resulted in an acquittal, no.

Q: There is no insanity defense for the guilt phase?

A: Not that would have resulted in an acquittal.

Q: There's no defense of any kind to the guilt phase?

A: That's—I think that's what I said before, yes.

Our review of the record confirms the opinions expressed by both Dubiner and Haughwout. Even if trial counsel were, arguendo, deficient at the guilt phase, Van Poyck was not prejudiced by any of those mistakes. We stress, however, that we find few deficiencies. For instance, Klein clearly had tactical reasons for limiting his presentation of evidence that might indicate a triggerman other than Van Poyck. Klein testified at the evidentiary hearing below that he did not want to give up his "sandwich." In other words, he did not want to lose the opportunity of

giving two closing arguments at the guilt phase. To that end, he stated the following:

> Q: Was there—when you talked about the fact that it was important to save the sandwich, you're talking about the ability for the defense to argue first and last if there's no evidence offered aside from the testimony of the defendant?
>
> A: Yes.
>
> Q: Was that significantly important to you, sir?
>
> A: It was. It was very important to both Mr. Dubiner and myself.
>
> Q: Do you place an importance of argument over evidence?
>
> A: Generally, no, I don't. But I thought in this case it was very important to have the opening salvo and the closing salvo.
>
> Q: Was argument an important portion of Mr. Van Poyck's capital case for the defense?
>
> A: Yes.
>
> Q: How important?
>
> A: Argument?

Q: Yes.

A: Since we didn't have any exculpatory evidence, I would say it was crucial.

We find it clear that Klein had sufficient tactical reasons for refraining from the presentation of further direct evidence (in the form of DNA tests and receipts from a gun shop) as to the triggerman's identity.

Van Poyck also alleges that Klein was deficient in his cross- examination of Officer Turner, the guard who survived the incident. As to that cross-examination, Klein testified at the evidentiary hearing as follows:

Q. Before going into that cross-examination, had you made some decision about how you were going to approach Mr. Turner?

A. I had many, many months to think about it, yes. I made a decision we were—that I was not going to flat out attack him but be somewhat sensitive in cross-examining Mr. Turner because I thought he would be very sympathetic to the jury.

Q. And it was a tactical decision, I take it, that you're describing?

A. Yes, I suppose you could put it that way. It was tactical. Him being the surviving guard in the incident, I thought the jury would have

> tremendous sympathy for him and I think probably would look askance on anybody directly attacking this guy. He was lucky to be alive, after all.

Despite these practical considerations, Klein still conducted a thorough cross-examination. His performance in this area was not deficient.

Next, Van Poyck argues that Klein was deficient in failing to investigate a voluntary intoxication defense. The record refutes any suggestion that Van Poyck was intoxicated at the time of the offense. Indeed, Van Poyck himself told Klein that he was sober. Further, Klein independently investigated the possibility that there was cocaine in the car used. He found no evidence of such substance. Klein was not deficient for rejecting this theory of defense.

In sum, Van Poyck was not denied effective assistance of counsel at the guilt phase. We can find few, if any, deficiencies in Klein's performance. More important, however, is that fact that Van Poyck can demonstrate no prejudice. Van Poyck has the heavy burden of demonstrating that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. Our review of the record demonstrates that the result in the guilt phase of this case is certainly reliable. This is reinforced by the testimony, at the evidentiary hearing below, of two of Van Poyck's own witnesses. We affirm the holding of the court below on this issue.

Brady Claim

As his fifth[15] issue, Van Poyck claims that a note in the state attorney's file was withheld from him during discovery. He further claims that the note was both material and exculpatory. In *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." The note at issue is not evidence. Instead, it is work-product. Even if it were evidence, though, it would not be material. In *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383-84, 87 L.Ed.2d 481, (1985)(Blackmun, J., plurality opinion), *id.* at 685, 105 S.Ct. at 3385 (White, J., concurring in part and concurring in judgment), the United States Supreme Court forwarded the following formulation for determining materiality: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Applying such a materiality standard to the facts of this case, there is clearly no reasonable probability that the result would have been altered had the challenged note been disclosed. The contents of the challenged note

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[15] Van Poyck's fourth issue concerning the great risk to many aggravating circumstance is procedurally barred and will, consequently, be addressed with other procedurally barred issues after we finish rejecting the claims that merit substantive review.

indicated that the "wound [came] from the driver's side." This presumptively militated against a finding that Van Poyck was the triggerman. It would certainly have no effect on Van Poyck's conviction for felony murder. Therefore, the court below properly rejected this claim. We affirm the denial of relief.

Remainder of Van Poyck's Claims

The remainder of Van Poyck's claims are as follows: (4) the great risk to many aggravating circumstance was unconstitutionally vague; (6) the judge and jury weighed the invalid aggravating factors that the murder was premeditated or that Van Poyck was the triggerman; (7) the prosecutorial argument as well as the jury instructions improperly shifted the burden of proof during the penalty phase proceedings; (8) the trial court improperly denied Van Poyck's challenges for cause during jury selection; (9) Van Poyck's constitutional rights were violated by the prosecutor's conduct during trial; (10) the acquittal and affidavit of O'Brien together with the testimony of Turner necessitate a new trial; (11) *Enmund /Tison*[16] errors necessitate a reversal of Van Poyck's death sentence; (12) the consideration, as an aggravating circumstance, of the underlying felony that had already been utilized to convict Van Poyck of felony murder was improper; (13) the trial court and prosecutor erred in indicating to the jury that sympathy was an inappropriate consideration; (14)

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[16] *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

the trial court failed to conduct an independent evaluation of the mitigation offered by Van Poyck; (15) the jury instructions given at the penalty phase were vague and confusing; and (16) the trial court committed fundamental error by failing to instruct the jury on justifiable or excusable homicide as part of the instruction on manslaughter.

All of these claims are procedurally barred. Most were raised and rejected on direct appeal.[17] One of these claims was not objected to at trial and fails to rise to the level of fundamental error.[18] Finally, two of the claims are waived because they should have been raised on direct appeal.[19]

For the reasons expressed, we affirm the lower court's denial of all relief.

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[17] Claims that were raised and resolved on direct appeal include (4), (6), (8), (10)(this material does not qualify as newly discovered evidence and the challenges to the convictions for attempted escape and premeditated murder were resolved in the direct appeal), (11), (12), (14), and (15). As to claim (4), we specifically stated in the direct appeal that "[w]e find that none of the other claims merit discussion. Further, we conclude that each of the aggravating circumstances found by the trial judge was properly established in this record and that the trial judge could properly conclude that the aggravating circumstances outweighed the mitigating evidence in this cause." *Van Poyck*, 564 So.2d at 1071. No subsequent change in the law is relevant to this analysis and therefore the procedural bar remains in place.

[18] Claim (9) is barred due to a lack of a contemporaneous objection at trial. Any error would not be fundamental.

[19] Claims (7) and (13) should have been raised on direct appeal.

It is so ordered.

OVERTON, GRIMES, HARDING and WELLS, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which KOGAN, C.J. and SHAW, J., concur.

ANSTEAD, Judge, concurring in part and dissenting in part.

I dissent from that part of the opinion finding no error in the trial court's failure to consider the evidence of Dr. Villalobos, and in the majority's approval of the trial court's finding that trial counsel performed competently in investigating and preparing appellant's case for the penalty phase proceedings. This Court was faced with almost the identical circumstances in *Deaton v. Dugger,* 635 So.2d 4, 9 (Fla.1993), wherein we held that counsel who waited until after the guilt phase to prepare for the penalty phase and then "scrambled" to investigate and prepare mitigation "deprived [the defendant] of a reliable penalty phase proceeding." The same holding is mandated here.

The trial court ignored the issue of the failure to investigate and, instead, focused entirely on the apparently misrepresented statements of Dr. Villalobos, and the trial court's speculation that appellant's bad record would have resulted in a death recommendation regardless of any mitigation.

Similarly, the majority here has ignored the undisputed evidence of lack of investigation and preparation, as well as this Court's own prior opinion which demonstrates counsel's utter failure to present any viable mitigating evidence to the trial judge and jury. See *Van Poyck v. State,* 564 So.2d 1066 (Fla.1990). The majority fails to acknowledge, for example, that even the meager mitigation evidence presented by counsel was not put together until after the penalty phase began, and even then counsel conceded he had to "scramble" to put anything on.[20] Further, the attempt at mitigation by this "scramble" actually backfired when the trial court not only rejected it, but used it to bolster the case against the defendant. *See* 564 So.2d at 1069.

The majority has simply rehashed a lot of general information known to trial counsel in an attempt to put the best face on a very bad situation. Tellingly, the majority has devoted some ten pages to a vain attempt to support a flawed analysis of less than two pages issued by the trial court.[21] *See* Majority op. at 688-695.

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[20] This "scramble" included the ill-fated attempt to use Dr. Villalobos, who, without time to do and review testing and secure background materials on the defendant, refused to get involved.

[21] The entire analysis and findings of the trial court are set out in less than two (2) pages that state:

> The great bulk of all the testimony received by the Court centers around counsel's alleged ineffective assistance during the penalty phase. Both trial co-counsel, Dubiner and Petitioner's expert, Haughwout, testified in great depth on this issue.
>
> Petitioner also presented the live expert testimony of Jan

Vogelsang, a licensed clinical social worker, and Dr. Robert Phillips, a psychiatrist, along with the affidavits of two additional experts. Eight of the remaining nine live witnesses and most of the affiants were lay people, all of who [sic] testified to different aspects about the Petitioner's dysfunctional background. Each stated they could and would have testified during the penalty phase of the trial if called upon to do so.

The nexus of Petitioner's argument under this claim is primarily based upon the allegation that counsel failed to conduct a penalty phase investigation until the conclusion of the guilt-innocence phase; that what investigation was done was totally inadequate and ineffective and failed to present any in-depth mitigating mental health and background evidence. The sole witness presented by the State was Petitioner's trial co-counsel, Cary Klein. Despite Petitioner's evidence to the contrary, Klein investigated the possibility of mitigating mental health factors. In fact, he obtained the services of one Dr. Villalobos, a psychiatrist, who after interviewing the Petitioner prior to the penalty phase and reviewing psychological tests performed upon the Petitioner, told Klein that he, Dr. Villalobos, had nothing helpful to say about the Petitioner. Dr. Villalobos also told Klein that the Petitioner had told him that he, the Petitioner, had faked mental illness while in prison. Dr. Villalobos further informed Klein that the test results were unfavorable to Petitioner, that petitioner was a sociopath, and that he saw no evidence of organic brain syndrome. Armed with this information together with Petitioner's attempted escapes and long history of incarceration, Klein made a conscious, tactical judgment not to pursue this line of defense in the penalty phase of the trial for fear of opening a Pandora's box.

In view of the overwhelming evidence of guilt coupled with the Petitioner's extensive criminal and juvenile background, his admissions at the time of the trial, and in light of the 11 to 1 vote to impose the death penalty (which means a minimum of 5 jurors would have had to have voted differently), Petitioner has failed to carry the burden established by the United States

The undisputed facts in this case present a blatant example of counsel's failure to investigate and prepare a penalty phase defense. Once again, we have a lawyer appointed who had absolutely no experience in capital cases. Now, there are many resourceful and talented lawyers who, although lacking specific experience, would be able to learn the system and do an outstanding job of investigating and preparing a defense. However, in this case we have an inexperienced lawyer who has conceded that he was unprepared and, in his words "caught with [his] pants down," because he had erroneously assumed that the trial court would grant a lengthy continuance between the guilt phase and the penalty phase of the proceedings.

We do not have to guess at whether counsel did a proper investigation and prepared a defense *before* the penalty phase began: counsel admits he did not. Trial counsel acknowledged under oath that with the denial of a continuance he simply "ran out of time" to properly investigate mitigation. In addition, we have the sworn and unrebutted testimony of co-counsel who says the situation was so bad that he threatened to go to the trial judge and disclose the blatant lack of investigation and preparation. He concedes that he made a serious mistake in not doing so.

In the post-conviction hearing below the appellant presented a vast array of mitigating

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Supreme Court in *Strickland,* i.e. the probability of a different trial outcome.

circumstances of the most serious nature that should have been thoroughly investigated and presented at the original penalty phase. Two brief excerpts from appellant's brief provide a flavor of the information that would have been discovered had a proper investigation of appellant's life been done:

> Billy was sent to youth hall for the first time at age 12. Shortly after he arrived there, he was raped. Two years later, he was sent to the Florida School for Boys at Okeechobee. At Okeechobee, Billy was hog tied, drenched in water and left over night in the "wet room," and frequently sent to the "ice cream room," where he was given thirty licks with straps and paddles, the process being repeated if he cried out during the beating. T. 486, 498; App. 32. He also saw other

> children be sexually abused, and was placed under the supervision of older and larger offenders. T. 205-09. The substandard conditions at Okeechobee are well documented, *see generally* App. 37, and were described in detail by juvenile justice expert Paul DeMuro. DeMuro described the dangerous, overcrowded conditions in the dormitories, where status offenders were not separated from violent offenders, nor smaller children from larger, leading to frequent physical and sexual assaults on the younger and smaller children; the absence of any attempt to treat or rehabilitate youthful

offenders; and the fact that small, middle class white boys without a history of institutionalization (like Billy Van Poyck when he was first sent to Okeechobee) were at the greatest risk. T. 319-32.

....

Approximately two years after Billy was sent to adult prison, he suffered a breakdown. For most of the next several years he received psychiatric treatment and medication, including "industrial strength" dosages of antipsychotic medications, and two admissions to the Florida State Hospital in Chattahoochee. T. 595-605; *see generally* Def. Exs. 23, 24. Dr. Rothenberg believes that this breakdown was the predictable result of the failure to provide the type of long term inpatient treatment he had recommended for Billy:

This subsequent history confirms my initial diagnosis. It is predictable and almost inevitable that a young and vulnerable person, already suffering from psychosis, would deteriorate further when placed in an adult prison, without any therapeutic intervention. In the absence of the type of therapeutic intervention that I recommended, there is no reason to believe that Mr. Van Poyck's mental illness has ever dissipated. While the observability of such a mental illness fluctuates over time and may be masked by medication, the mental illness itself persists.

App. 46.

> All of this mitigating evidence was readily available to trial counsel, but none of it was discovered or presented. The reasons for these failures are not far to seek. Mr. Van Poyck's lead attorney was Cary Klein. Klein was a general litigation attorney who had never before handled a capital case. T. 1041-42. From the beginning of this difficult, complex case Klein believed a felony murder conviction likely, and that the case would almost certainly go to a penalty phase proceeding. T. 1145. Also, at the very outset of the case Klein *discussed* potential mitigation with Mr. Van Poyck. T. 1060-61. However, Klein did not *investigate* for mitigation at any time prior to the trial. Instead, he had decided to wait until the guilt phase of the trial was over to begin penalty investigation because he believed that the trial court would give a one to three week continuance between phases. T. 1158. He explained at the hearing that he was counting on this time to "investigate" penalty phase issues and felt safe in doing so because the court had "assured" him that there would be a few weeks between phases. *Id.* As it turned out, no continuance was forthcoming, and the record contains no written or oral order or promise of a continuance. *See* T. 1196.

Appellant's Initial Brief at 15, 17-18.

In our previous review of this case we found insufficient evidence of premeditation but affirmed appellant's guilt on a felony-murder theory. In our opinion we upheld the sentence of death and expressly noted that the trial court properly rejected the meager mitigation offered by counsel. *Van Poyck v. State,* 564 So.2d 1066 (Fla.1990). Knowing what we do now, we should not give our approval to a sentence of death predicated upon a patent case of ineffective assistance of counsel. In doing so we are simply providing additional support to the already considerable body of evidence that the death penalty process is seriously flawed by the legal system's tolerance of incompetent counsel. *Cf.* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer,* 103 Yale L.J. 1835 (1994). Van Poyck is not going anywhere; he has been convicted and imprisoned for first degree murder. His conviction and imprisonment are not in question. We should apply our holding in *Deaton v. Dugger* and remand this case for a reliable penalty phase proceeding in which evidence of aggravation and mitigation can be presented by counsel prepared on *both* sides.

KOGAN, C.J. and SHAW, J., concur.

694 So.2d 686, 22 Fla. L. Weekly S161

APPENDIX F

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PALM BEACH COUNTY.

CRIMINAL DIVISION "V"

CASE NO.: 87-0736-CF A02
88-11116-CF A02

STATE OF FLORIDA

VS.

WILLIAM VAN POYCK,

Defendant.

ORDER

THIS MATTER is before the Court for Sentencing. The Court notes that the order will contain sentencing for each court and that the sentencing order will state the counts in the same order of the verdict form, not the order of the indictment.

COURT I: The jury having found the Defendant, WILLIAM VAN POYCK guilty of First Degree Murder and having by a vote of eleven to one made a recommendation of death it is the judgment

and sentence of the Court that WILLIAM VAN POYCK be sentenced to death for the murder of FRED GRIFFIS. Said sentence is to be carried out in accordance with the laws of the State of Florida.

The Court finds as aggravating circumstances the following:

1. The crime for which WILLIAM VAN POYCK is sentenced to death was committed while he was under a sentence of imprisonment in that he was on parole at the time of commission of this act.

2. The crime for which the Defendant is sentenced was committed for purpose of effecting an escape from custody and in this case to effect the escape of Mr. O'Brien.

3. The Defendant in the commission of this crime for which he is sentenced knowingly created a great risk of death to many persons; this includes the people at the scene of the murder to wit: Officer Steven Turner, Mr. Ruble and Mr. Zimmerman who work at Good Samaritan Hospital and upon hearing the shots went to check the matter out and saw Mr. Van Poyck point a firearm at them. After the incident a bullet hole was found in the nurses' residence next to the doctor's office where the murder occurred, in the direction and area Mr. Van Poyck had pointed the firearm at Mr. Ruble and Zimmerman. Further, Mr. & Mrs. Brown in the Cadillac that pulled up into the alley as the events occurred; the individuals in the doctor's office including but not limited to: Mrs. Oriole, Dr. Rosenberg, and Lisa Bancraft, who were looking out

the windows and door, along with another witness, Heff who was standing in the alley watching all the events.

This Court believes that the chase that took place in Mr. Van Poyck and Mr. Valdes' attempt to escape from the scene where numerous police cars were fired at, approximately twenty shots total, on two of the busiest streets in Palm Beach County, (Palm Beach Lakes Blvd. & Australian Blvd.) Is a part of this aggravating factor of knowingly creating a great risk of death to many persons, (see the convictions for counts 0 through 11).

4. The Defendant, WILLIAM VAN POYCK having previously been convicted of another capitol offense or felony involving the use of threat or violence to some person, in this case the prior conviction of the offense of robbery, which involved a shooting and chase.

Further this Court does not find that any mitigating factors exist or have been shown to exist. The defendant presented evidence which attempted to show that he was under the influence of another person to wit; his brother and or Mr. O'Brien. This Court finds that the evidence was totally lacking to establish in any way that mitigating factor based upon the fact that he clearly had had no contact with his brother for numerous years other than by infrequent letter writing and that he had in fact not seen Mr. O'Brien for a long period of time. Further the Defendant admitted on the stand that he was operating during the commission of this offense as a

person responsible for his own acts and with knowledge of what he was doing.

The only other potential mitigating circumstance for which evidence was presented was that the Defendant, WILLIAM VAN POYCK's mother died when he was approximately eighteen (18) months of age. However it was shown that he was subsequently raised in a good family and by people that cared for him. Further the Court would note that Mr. Van Poyck is an individual who is quite intelligent and very knowledgeable as to the law and that he himself admits that he was well aware of the law including felony murder, that he himself was the individual who planned this operation who retained Mr. Valdes to assist him and who checked the guns on the way to the location where the murder occurred to see to it that they were loaded. By all evidence Mr. Van Poyck was a major participate in this murder.

The Court further finds that the State clearly presented competent and substantial evidence as to the crime of first degree felony murder and or first degree pre-mediated murder and in reality presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.

COUNT II: This Court for the sentence of armed robbery with a firearm sentences the Defendant, WILLIAM VAN POYCK to a term of LIFE in the State Department of Corrections with a three year mandatory minimum sentence to run consecutive with any sentence prior imposed.

COUNT VI: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense of attempted manslaughter, to run consecutive with any sentence prior imposed.

COUNT VII: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense or attempted manslaughter, to run consecutive with any sentence prior imposed.

COUNT VIII: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of the charge of attempted manslaughter, said sentence to run consecutive to any sentence prior imposed.

COUNT IX: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense of attempted manslaughter, this sentence to run consecutive to any prior imposed.

COUNT X: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of attempted manslaughter, said sentence to run consecutive to any prior imposed.

COUNT XI: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of attempted manslaughter, said sentence to run consecutive to any prior imposed.

COUNT XII. This Court sentences the Defendant, WILLIAM VAN POYCK to 5 years with a minimum mandatory sentence of 3 (three)

years for the conviction of aggravated assault said sentence shall run consecutive to any prior imposed.

COUNT XIV. This court sentences Defendant, WILLIAM VAN POYCK to 15 years for the conviction of aiding in the attempted escape said sentence to run consecutive to any prior imposed.

For the conviction contained in information 88-11116-CF A02 this Court on the charge of Attempted First Degree Murder, this court sentences the Defendant to LIFE In prison to run consecutive to any prior imposed, with a 3 year mandatory minimum. This mandatory minimum 3 year sentence shall run concurrent with the mandatory minimum sentence contained in count two.

DATE AND ORDERED this ___ day of _____, 198__, in West Palm Beach, Palm Beach County, Florida.

_____

MICHAEL D. MILLER
CIRCUIT COURT JUDGE

APPENDIX G

Jury Verdict Form Excerpts

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
CRIMINAL DIVISION, IN AND FOR
PALM BEACH COUNTY FLORIDA

INDICTMENT NO: 87-6736CF A02

VERDICT

STATE OF FLORIDA)
)
)
VS.)
)
WILLIAM VAN POYCK)

AS TO EACH COUNT, CHECK ONLY ONE

COUNT ONE

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guily of FIRST DEGREE MURDER of Officer Fred Griffis, as charged in the Indictment.

We, the jury, also find that the Murder was:

a. First Degree Premeditated Murder

_____

b. First Degree Felony Murder
__X__

c. Both, First Degree Premeditated Murder and First Degree Felony Murder
__X__

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of SECOND DEGREE MURDER of Officer Fred Griffis, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of THIRD DEGREE FELONY MURDER of Officer Fred Griffis, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of MANSLAUGHTER of Officer Fred Griffis, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm ____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT TWO

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ARMED

ROBBERY WITH A FIREARM of Officer Steve Turner, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ROBBERY WITHOUT A FIREARM of Officer Steve Turner, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of GRAND THEFT of Officer Steve Turner, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty,

COUNT SIX

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Richard Hines, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Richard Hines, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Richard Hines, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED

MANSLAUGHTER of Officer Richard Hines, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm X
b. without a firearm ____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT SEVEN

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Freddie Naranjo, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Freddie Naranjo, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Freddie Naranjo, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Freddie Naranjo, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm ____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT EIGHT

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Geoffery Woodward, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Geoffery Woodward, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Geoffery Woodward, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Geoffery Woodward, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm ___X___
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT NINE

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Dale Fell, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Dale Fell, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Dale Fell, as contained in the Indictment,

___X___ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Dale Fell, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm ___X___

b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT TEN

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Robert Provost, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Robert Provost, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Robert Provost, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Robert Provost, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__

b. without a firearm ____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT ELEVEN

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer John Woods, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer John Woods, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer John Woods, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer John Woods, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm ____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

7

COUNT TWELVE

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of AGGRAVATED ASSAULT of Fred Brown, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED AGGRAVATED ASSAULT of Fred Brown, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ASSAULT of Fred Brown, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm ____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT FOURTEEN

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of AIDING IN THE ATTEMPTED ESCAPE of James O'Brien, as charged in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm ____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

INFORMATION NO. 88-11116-CF A02

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Steven Turner, as charged in the Information,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Steven Turner, as contained in the Information,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Steven Turner, as contained in the Information,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Steven Turner, as contained in the Information,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm ____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

So say we all.

_____, 19__. _____
West Palm Beach, Florida.

APPENDIX H

IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,	)	
	)	
Appellant	)	
	)	Case No. SC05-1513
vs.	)	Circuit Court Case Nos.:
	)	87-6736CF
STATE OF FLORIDA,	)	88-11116CF A02
	)	
Appellee	)	

APPELLANT'S MOTION FOR REHEARING AND/OR CLARIFICATION

Comes now the Appellant herein, WILLIAM VAN POYCK, by and through his undersigned counsel, and pursuant to Rule 9.330, Florida Rules of Appellate Procedure, hereby submits this Motion For Rehearing And/Or Clarification. Appellant respectfully submits that the majority of this Court, in its May 3, 2007, decision ("Decision"), misapprehended and/or overlooked certain substantial legal and factual matters, as described below.

ARGUMENT

Van Poyck continues to acknowledge, as he has throughout this appeal, that this Court's

previous holding that Van Poyck's non-triggerman status is irrelevant to his death sentence is controlling as to the issues presented here. *See Van Poyck v. State*, 908 So.2d 326 (Fla. 2005) ("*Van Poyck IV*"). However, Van Poyck requested that this Court reconsider *Van Poyck IV* in light of intervening decisions by this Court and the United States Supreme Court. See initial brief at 13-16. Van Poyck now submits that this Court's dismissal of the United States Supreme Court's decision in *Bradshaw v. Stumpf*, 545 U.S. 175 (2005) as "largely limited to its facts and procedural posture" fundamentally overlooks and misapprehends the critical question the U.S. Supreme Court left open: that is, whether a prosecutor's presentation of "inconsistent positions" as to who pulled the trigger amounts to a due process violation, or whether any such violation would be prejudicial. *Compare Bradshaw*, 545 U.S. at 187 *with* Decision at 15.

In Van Poyck's case, the recently discovered evidence (the Diaz affidavit) presented to the Court makes clear that Van Poyck's case is even more compelling than the facts in *Bradshaw*: here, the prosecutor did not present "inconsistent positions." The prosecutor argued to the jury that Van Poyck was the triggerman - which this Court later held to be unsupported - and asked the jury to base its deliberations on that faulty assumption. And the jury, as evidenced by the

verdict form finding Van Poyck guilty of "premeditated murder", accepted that argument. As noted in Justice Anstead's dissent from the Decision, the prosecutor argued during the penalty phase: "So again, it is important who the triggerman is. There is no doubt about it. It's important to your deliberations, okay." Decision at 18 (Anstead, J., dissenting). Because Van Poyck was unavoidably unaware of Diaz's knowledge at that point, he had limited ability to contest the prosecutor's statements.

The State's argument, and the jury's erroneous findings that Van Poyck was the triggerman deprived Van Poyck of his absolute state law and constitutional right to present the substantial mitigating fact that Van Poyck did not kill anyone. It is well established that the fact that a defendant did not actually kill the victim constitutes powerful non-statutory mitigating evidence. *See, e.g., Zerquera v. State*, 549 So.2d 189, 193 (Fla. 1989). A defendant's constitutional right to present non-statutory mitigating evidence is, of course, also well established. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (a jury must be able to "consider and give effect to [a defendant's mitigating] evidence in imposing sentence"); *Johnson v. Texas*, 509 U.S. 350, at 381 (O'Connor, J., dissenting) ("A sentencer [must] be allowed to

give full consideration and full effect to mitigating circumstances"). Had Van Poyck been able to present the substantial mitigating evidence that he did not kill anyone there is at least "a reasonable probability" that his jury and judge would have imposed a different sentence. This Court, in fact, reached this same conclusion in the remarkably similar case of *State v. Mills*, 788 So.2d 249 (Fla. 2001).

Yet this Court's opinion summarily assumes that "a due process claim . . . is not an aspect of this case," because of testimony that was presented at the trial of Van Poyck's accomplice, Frank Valdes. Decision at 15-16 and n.4. This Court should not, without analysis, discount a possible due process violation against Van Poyck on the grounds that it was somehow cured by testimony given during an entirely different proceeding against a different defendant.

This fundamental misapprehension by the majority as to the true nature of the issue at bar results in a denial of Van Poyck's due process rights. Under established principles of due process Van Poyck possesses a constitutional right to the disposition of the merits of his claim in a manner consistent with due process. Van Poyck moves this Court to clarify the Decision to more clearly explain why Van Poyck's due process rights have not been violated in light of the *Bradshaw* analysis - and the question is left open.

CONCLUSION

WHEREFORE, based upon the foregoing facts and arguments, as well as the record in this case, Van Poyck moves this Court to reconsider its decision dated May 3, 2007, and to grant Van Poyck the relief requested in his initial brief.

Respectfully submitted,

By: _____

Counsel of Record (admitted pro hac vice):

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to: Celia A. Terenzio, Senior Assistant Attorney

General, Department of Legal Affairs, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL., 33401, on this 18th day of May, 2007, by UPS Overnight Delivery.

/s/ _____

APPENDIX I

CONSTITUTIONAL PROVISIONS INVOLVED

EIGHTH AMENDMENT: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty and property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.